



Jurisprudence - SEM 7-1

Indian Philosophy (University of Calcutta)



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7TH SEMESTER JURISPRUDENCE NOTES

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JURISPRUDENCE

Q. What do you understand by the term Jurisprudence? Discuss the scope and utility of Jurisprudence. Is Jurisprudence a Social science?

The history of the concept of law reveals that jurisprudence had its evolutionary beginning from the classical Greek period to 21st-century modern jurisprudence with numerous changes in its nature in various stages of its evolution. Jurisprudence is a concept to bring theory and life into focus. It deals with the fundamental principles on which rests the superstructure of law. The concept of jurisprudence basically helps in cultivating one's own ideas in relation to a particular theory. In abstract jurisprudence is a subject whose knowledge is the basis and the foundation of the whole legal studies. Jurisprudence is a name given to a certain type of investigation into law, where we are concerned to reflect on the nature of legal rules and on the underlying meaning of legal concepts and on the essential features of the legal system.

Jurisprudence is both an intellectual and idealistic abstraction as well as a behavioural study of man in society. In jurisprudence, we ask what it is for a rule to be a legal rule and what distinguishes law from morality, etiquette and other related phenomena.

Meaning: The term jurisprudence has been derived from the Latin word 'jurisprudencia' which means 'skill or knowledge of law'.

In the early decades of the 19th century with the theories propounded by Bentham and Austin, the term 'jurisprudence' acquired a definite meaning. Bentham is known as Father of Jurisprudence was the first one to analyze what is law. He divided his study into two parts:

1. Examination of Law 'as it is' i.e. **Expositorial Approach**— Command of Sovereign.
2. Examination of Law 'as it ought to be' i.e. **Censorial Approach**— Morality of Law.

However, Austin concerned himself mainly with the formal analysis of the English law and its related concept, which still continues to be the basic concept. Austin's ideology that '**law is the command of the sovereign**' became the structure of English Legal System, which remained with the formal analysis of law as 'it is' (Expositorial) and never became 'as it ought to be' (Censorial).

Juristic approach

Ulpian – The Roman jurist defined jurisprudence as the observation of things, human and divine, the knowledge of the just and the unjust.

Austin— He calls jurisprudence as the 'philosophy of positive law'. The term 'positive law' connotes 'jus positivum' which means law lay down by a political superior for commanding obedience from his subjects. He preferred to divide his concept into two parts:

1. **General Jurisprudence**— It includes such subjects or ends of law as are common to all system.
2. **Particular Jurisprudence**— It is the science of any actual system of law or any portion of it.

Basically, **in essence, they are the same but in scope they are different.**

Salmond's Criticism of Austin

He said that for a concept to fall into the category of 'General Jurisprudence', it should be common in various systems of law. This is not always true as there could be concepts that fall in neither of the two categories.

Holland's Criticism of Austin

He said that it is only the material which is particular and not the science itself.

Holland's Definition– Jurisprudence means **the 'formal science of positive laws'**. It is an analytical science rather than a material science.

1. He defined the term positive law. He said that Positive Law means **the general rule of external human action enforced by a sovereign political authority**.
2. We can see that, he simply added the word '**formal**' in Austin's definition. Formal here means that **we study only the form and not the essence**. We study only the external features and do not go into the intricacies of the subject. According to him, how a positive law is applied and how it is particular is not the concern of Jurisprudence.
3. The reason for using the word '**Formal Science**' is that it describes only the form or the external sight of the subject and not its internal contents. According to Holland, Jurisprudence is not concerned with the actual material contents of law but only with its fundamental conceptions. **Therefore, Jurisprudence is a Formal Science**.
4. This definition has been criticized by Gray and Dr Jenks. According to them, Jurisprudence is a formal science because it is concerned with the form, conditions, social life, human relations that have grown up in the society and to which society attaches legal significance.
5. Holland said that Jurisprudence is a science because **it is a systematized and properly co-ordinate knowledge of the subject of intellectual inquiry**. The term positive law confines the inquiry to these social relations which are regulated by the rules imposed by the States and enforced by the Courts of law. Therefore, it is a formal science of positive law.

Salmond– He said that **Jurisprudence is Science of Law**. By law, he meant **law of the land or civil law**. He divided Jurisprudence into two parts:

1. **Generic**– This includes the entire body of legal doctrines.
2. **Specific**– This deals with the particular department or any portion of the doctrines.

'Specific' is further divided into three parts:

1. **Analytical, Expository or Systematic**– it deals with the contents of an actual legal system existing at any time, past or the present.
2. **Legal History**– it is concerned with the legal system in its process of historical development.
3. **The science of Legislation**– the purpose of it is to set forth law as it ought to be. It deals with the ideal future of the legal system and the purpose which it may serve.

Criticism of Salmond– Critics says that it is not an accurate definition. Salmond only gave the structure and failed to provide any clarity of thought.

Keeton- according to him “jurisprudence is the study and scientific synthesis of the essential principle of law.” The definition seeks to explain the distinction between public and private law.

Roscoe Pound– He described **Jurisprudence** as “**the science of law** using the term ‘law’ in the **juridical sense** as denoting the body of principles recognized or enforced by public and regular tribunals in the Administration of Justice.”

Dias and Hughes– They believed **Jurisprudence** as **any thought or writing about law rather than a technical exposition of a branch of law itself.**

Scope of Jurisprudence

The scope of jurisprudence has widened considerably over the years. Commenting on the scope of jurisprudence **Justice P.B.Mukherjee** observed, “Jurisprudence is both an intellectual and idealistic abstraction as well as the behavioural study of man in society. It includes political, social, economic and cultural ideas. It covers the study of man in relation to society.” This makes the distinction between law and jurisprudence amply clear. It, therefore, follows that jurisprudence comprises the philosophy of law and its object is not to discover new rules but to reflect on the rules already known.

Whereas, Austin was the only one who tried to limit the scope of jurisprudence. He tried to segregate morals and theology from the study of jurisprudence.

Approaches to the study of Jurisprudence

There are two ways to study it-

1. **Empirical**– Facts to Generalization.
2. **A Priori**– Start with Generalization in light of which the facts are examined.

Significance and Utility of the Study of Jurisprudence

1. This subject has its own intrinsic interest and value because this is a subject of serious scholarship and research; researchers in Jurisprudence contribute to the development of society by having repercussions in the whole legal, political and social school of thoughts. One of the tasks of this subject is to construct and elucidate concepts serving to render the complexities of law more manageable and more rational. It is the belief of this subject that the theory can help to improve practice.
2. Jurisprudence also has an educational value. It helps in the logical analysis of the legal concepts and it sharpens the logical techniques of the lawyer. The study of jurisprudence helps to combat the lawyer’s occupational view of formalism which leads to excessive concentration on legal rules for their own sake and disregard of the social function of the law.
3. The study of jurisprudence helps to put the law in its proper context by considering the needs of the society and by taking note of the advances in related and relevant disciplines.

4. Jurisprudence can teach the people to look if not forward, at least sideways and around them and realize that answers to a new legal problem must be found by a consideration of present social needs and not in the wisdom of the past.
5. Jurisprudence is the eye of law and the grammar of law because it throws light on basic ideas and fundamental principles of law. Therefore, by understanding the nature of law, its concepts and distinctions, a lawyer can find out the actual **rule of law**. It also helps in knowing the language, grammar, the basis of treatment and assumptions upon which the subject rests. Therefore, some logical training is necessary for a lawyer which he can find from the study of Jurisprudence.
It trains the critical faculties of the mind of the students so that they can dictate fallacies and use accurate legal terminology and expression.
6. It helps a lawyer in his practical work. A lawyer always has to tackle new problems every day. This he can handle through his knowledge of Jurisprudence which trains his mind to find alternative legal channels of thought.
7. Jurisprudence helps the judges and lawyers in ascertaining the true meaning of the laws passed by the legislators by providing the rules of interpretation. Therefore, the study of jurisprudence should not be confined to the study of positive laws but also must include normative study i.e. **that study should deal with the improvement of law in the context of prevailing socio-economic and political philosophies of time, place and circumstances.**
8. Professor Dias said that *"the study of jurisprudence is an opportunity for the lawyer to bring theory and life into focus, for it concerns human thought in relation to social existence."*

Jurisprudence is Lawyer's extraversion

In the words of Julius Stone, the study of jurisprudence should be integrative, synthetic and purposive while concentrating towards the need of humanistic justice. He firmly believed that jurisprudence is lawyer's extraversion as it is the lawyer's examination of precepts and techniques of the law in the light derived from present knowledge in disciplines other than law.

A lawyer should not be a mere legal technician knowing legal texts and procedure but, he should be a social activist. The 'extra-legal version' approach to as an instrument of social change and reforms has found favour with the judges of the Supreme Court, notably Justice S.N.Gajendragadkar, Justice Y.V.Chandrachud, Justice Chagla, Justice P.N.Bhagwati, and others.

Adopting a pragmatic to the application of law, Justice Y.V.Chandrachud in **Vishnu Agencies (P) Ltd. v. C.T.O.[AIR 1978 SC 449]** observed that "legal fraternity should not construe the provisions of the constitution in a narrow and pedantic sense, instead a broad and liberal spirit should inspire those whose duty is to interpret the law. A constitution is a living and organic thing which of all instruments has the greatest claim to be construed '**ut res magis valeat quam pereat**' (it is better for a thing to have effect than to be made void)- the lawyers and judges ought to extend the constitutional provisions for elimination of poverty, social inequalities, and economic injustices."

Mr Justice Krishna Iyer, a former judge of the Supreme Court, expounded the philosophy of jurisprudence as a lawyer's extraversion. **[(Rohtas Industries v. Its Staff Union, AIR 1976 SC 425); (Indian Express Newspapers (P) Ltd. v. Its Workers Union, AIR 1979 SC 137); (Som Prakash Rakhe v. UOI AIR 1981 SC 212), and other cases]** He firmly believed that "the problem of law is, at bottom, projections of life.... The root of jurisprudence lies in the soil of society's urges and the bloom in the nourishment from the humanity services."

Relationship of Jurisprudence with other Social Sciences

Jurisprudence is closely inter-related with other social sciences since all of them are concerned with human behaviour in society.

G.M.Paton “observed modern jurisprudence trenches on the field of social science and of philosophy; it digs into the historical past and attempts to create symmetry of a garden out of the luxuriant chaos of conflicting legal system.”

Dean Roscoe Pound who propounded the theory of law as a ‘social engineering’ pointed out that jurisprudence is closely inter-linked with ethics, economics, politics, and sociology which though distinct enough as the core, are shade into each other. All other social sciences must co-ordinate with jurisprudence to make it a functional branch of knowledge.

Sociology and Jurisprudence

This branch is based on social theories. It is essentially concerned with the influence of law on the society at large particularly when we talk about social welfare. G.W.Paton gave 3 obvious reasons as a relation between law and sociology:

- It enables a better understanding of the evolution and development of law;
- It provides great substream for an identity of law commensurate with human needs and social interests;
- and provides objectivity to legal interpretation which is need of the hour.

Jurisprudence and Psychology

No human science can be described properly without a thorough knowledge of Human Mind. Hence, Psychology has a close connection with Jurisprudence. Relationship of Psychology and Law is established in the branch of **Criminological Jurisprudence**. Both psychology and jurisprudence are interested in solving questions such as motive behind a crime, criminal personality, reasons for crime etc.

Jurisprudence and Ethics

Ethics has been defined as the science of Human Conduct. It strives for ideal Human Behavior. This is how Ethics and Jurisprudence are interconnected:

- a. **Ideal Moral Code**– This could be found in relation to Natural Law.
- b. **Positive Moral Code**– This could be found in relation to Law as the Command of the Sovereign.
- c. Ethics is concerned with good human conduct in the light of public opinion.
- d. Jurisprudence is related with Positive Morality in so far as the law is the instrument to assert positive ethics.
- e. Jurisprudence believes that Legislations must be based on ethical principles. It is not to be divorced from Human principles.
- f. Ethics believes that No law is good unless it is based on sound principles of human value.

A Jurist should be adept in this science because unless he studies ethics, he won't be able to criticize the law. However, Austin disagreed with this relationship.

Jurisprudence and Economics

Economics studies man's efforts in satisfying his wants and producing and distributing wealth. Both Jurisprudence and Economics are sciences and both aim to regulate the lives of the people. Both of them try to develop the society and improve the life of an individual. Karl Marx was a pioneer in this regard.

Jurisprudence and History

History studies past events. Development of Law for the administration of justice becomes sound if we know the history and background of legislation and the way law has evolved. The branch is known as **Historical Jurisprudence**.

Jurisprudence and Politics

In a politically organized society, there are regulations and laws which lay down authoritatively what a man may and may not do. Thus, there is a deep connection between politics and Jurisprudence.

Q. Salmond defines Jurisprudence as "The Science of Civil Law". Discuss the definition in all its aspects.

"The science of civil law" Salmond defines jurisprudence as "The science of law" or "Civil law". According to Salmond it is systematic study of civilization. In this definition Salmond says that law is a science and it concern with right and duties belonging to every citizen. Salmond uses the term jurisprudence in two senses.

· *Generic sense.*

· *Specific sense*

GENERIC SENSE: Generic Jurisprudence includes the entire body of legal doctrines. In that sense, jurisprudence is of three kinds.

§ Expiatory or Systematic jurisprudence:-It deals with the contents of an actual legal system as existing law at any time, whether in part or in present.

§ Legal History:-It deals with the history of development of law.

§ Science of Legislation:-The purpose of the science of legislation is to set forth law as it ought is being. It deals with the ideal of the legal system and the purpose for which it exists.

Specific Sense:- Specific jurisprudence deals with a particular department of legal doctrines. In this sense, it is also defined as "The Science of the first principles of the civil law". In this sense, he divides the subject into three branches.

· Analytic Jurisprudence.

· Historical Jurisprudence.

· Ethical Jurisprudence.

· **ANALYTIC JURISPRUDENCE:-** Analytical jurisprudence deals with the analysis of basic principles of law. It is not concerned with the past stages of its evolution. It is not concerned with its goodness or badness. The purpose is to analyze and discuss the law of the land as it exists today.

· **HISTORICAL JURISPRUDENCE:** Historical jurisprudence deals with the scientific study of evolution and development of principles of law. Historical jurisprudence is the history of the legal principles and conceptions of legal system. It is a movement for fact against fancy, a call for a return from myth to reality.

· **ETHICAL JURISPRUDENCE:-** Ethical jurisprudence deals with the law as it ought to be an ideal state. It investigates the purpose of law and the measure and manner in which that purpose is fulfilled. It concerns itself chiefly with the relation of law to certain ideas which law is meant to achieve.

CRITICISM ON SALMOND'S DEFINITION:- It is submitted that salmond had failed to give an accurate and specific definition and also the division made by him of jurisprudence into general and particular raises a great deal of criticism as the Hollan observes that these expressions should be discarded, as the science should be treated as incapable of being divided in to these two branches.

Q. 'Jurisprudence comprises philosophy of law' –Evaluate the statement.

Jurisprudence

Most Anglo-American legal academics view "jurisprudence" as mostly synonymous with "philosophy of law". This is not a unanimous view. There is still a lingering sense of "jurisprudence" that encompasses high legal theory of a non philosophical sort—the elucidation of legal concepts and normative theory from within the discipline of law. Moreover, in other legal cultures, for example, in Europe and Latin America, the move to identify jurisprudence with philosophy of law never really took root.

Philosophy of Law

The meaning of the phrase "philosophy of law" is inevitably tied up in the relationship between the two academic disciplines—philosophy and law. In the United States and the rest of the Anglophone world, "philosophy of law" is a subdiscipline of philosophy, a special branch of what is nowadays frequently called "normative theory" and closely related to political philosophy. Of course, there are many different tendencies within academic philosophy generally and the philosophy of law in particular. Still, the dominant approach to philosophy of law in the Anglophone world is represented by "analytic jurisprudence," which might be defined by the Hart-Dworkin-Raz tradition on the one hand and by the larger Austin-Wittgenstein-Quine-Davidson-Kripke tradition on the other.

Coexisting with the analytic tradition in the philosophy of law are many other philosophical approaches. These include Hegelianism, neo-Thomism, Marxism, as well as the contemporary continental philosophical tradition, ranging from Habermas (with close affinities to the analytic tradition) to Foucault and Derrida (with much more tenuous links).

The philosophy of law covers a lot of ground. An important line of development focuses on the "what is law?" question, but much contemporary legal philosophy is focused on normative questions in specific doctrinal fields. The application of moral and political philosophy to questions in tort and criminal law is an example of this branch of contemporary legal philosophy.

My sense of the "law of the land" is that debates over the "What is Law?" question have recently become more exciting (Scott Shapiro's work is just one example)--but in my opinion the center of attention has shifted from the nature of law to normative legal theory. A variety of potentially exciting developments that are very recent include the emergence of experimental jurisprudence and explorations of the connections between metaethics and metajurisprudence.

Legal Theory

Legal theory is a much broader and encompassing term, encompassing the philosophy of law and jurisprudence as well as theorizing from a variety of other perspectives, including law and economics and the law and society movement. In my opinion, "legal theory" is currently the best *neutral* term for referring to legal theorizing, broadly understood. It allows us to avoid the turf wars and sectarian disputes that make the word "jurisprudence" somewhat problematic.

Q. 'Rules of morality have nothing to do with the framing of Law'- Justify the statement.

Law is the mechanism (usually a set of norms/rules with corresponding sanctions) by which we define interpersonal relations. Morality is the categorization of human behaviors as "good" and "bad", which is a wholly personal, subjective exercise without recourse to objective moral truth or authority.

How is this not necessarily the same thing? In the mid-20th century, H.L.A. Hart, the father of modern legal positivism, argued the separability of law and morality in his seminal writings. Hart argued for the distinction between the law as it is and the law as it ought to be. Law does not cease to be law based upon one or another moral criticism. It is possible to study and practice law in a descriptive sense (how people do behave), instead of a normative sense (how people should behave).

Also, it is possible to use deontological (moral) language without making moral claims. As Hart pointed out, use of the word ought "need have nothing to do with morals". One may use the moral language of ought and should (and rights and duties) to further a specific aim without the attendant implication of categorizing whichever human behaviors as "good" and "bad".

But, the legal positivists leave much to be desired. They concede far too much to the natural law theorists. Even H.L.A. Hart conceded an appeal to the overlap of law and morality at the moment of creation of a legal/political system. He questioned whether a legal system, on the whole, which did not espouse some notion of "justice" as its central aim, had ever or could ever exist for long, despite the brutal imposition of severe sanctions, because the vast majority of persons living beneath its reach would feel no sense of moral obligation to abide by its dictates. He asked whether the nature of law itself demands recourse to a bare minimum of the most basic and general moral precepts, such as equal protection. However, he largely dismissed the question as holding little interest for him and as an "innocent pastime for philosophers".

The moral anti-realist philosophers, like Joshua Greene, deny the existence of objective moral truth or authority. Morality (the categorization of human behaviors as "good" and "bad") is a wholly personal, subjective exercise. Any moral claims, which claim to be objectively true, are false. There is no objective moral truth or authority. Therefore, there is no objective legal truth or authority. I am not a legal positivist. I am a legal anti-realist, just as I am a moral anti-realist. Laws are not real, and neither is morality, and they certainly aren't natural. The determination of legal validity (deciding whether or not any law or legal/political system is valid, just, moral, and,

thus, merits adherence) is a wholly personal, subjective exercise, just as any moral viewpoint is a wholly personal, subjective exercise.

First of all, denying the existence of objective moral truth is a meta-ethical claim, not an ethical claim. Second, I am free to advocate for whatever I wish. I am free to condemn whomever I wish. I am free to try and convince as many others as possible to adopt my personal, subjective moral viewpoint. It is possible to advocate on behalf of my subjective moral viewpoint, informed by evidence and science and reason, while maintaining a moral antirealist stance. Moral anti-realism does not condemn one to moral relativism or anarchy. It is possible to advocate for the establishment of a legal/political system without recourse to the myth of objective moral/legal truth.

But, these common retorts just seem like either fatuous delusions or disingenuous and specious sophistries. Because objective moral/legal truth or authority does not exist. And, there is no evidence that it does. And, in fact, there is a great deal of evidence otherwise. And, yet, we, or the vast majority of we, do, in fact, create and abide by and live under legal/political systems. We, or the vast majority of we, do, in fact, advocate for our personal, subjective moral viewpoints.

And, anyway, whatever happened to looking philosophical/moral quandaries in the face without flinching? When has burying our collective head in the sand ever made our problems better? Or, go away? When has pretending to know things that we do not know improved our lives?

Even secular humanists, rationalists, materialists, freethinkers and atheists can fall prey to that human, all too human thirst for order, structure, pattern, authority, and explanation. The noted "New Atheist" Sam Harris takes his turn at the fount of foundational myth in his latest book, *The Moral Landscape*, in which he advocates for a science of morality. He claims that, with the proper application of our reasoning faculties to enough factual evidence, we can access objective moral truth via the scientific method. His definition of "good" is that which promotes "well-being", which he admits he is unable to define, and his definition of "bad" is whatever detracts from "well-being". While he isn't so foolish as to suggest that evolutionary biologists should be the new moralists, he rejects Hume's contention that there exists an impermeable barrier between facts and values; that values are never objective; that we can never get an ought from an is.

Facts reveal nothing about morality. Facts and evidence are always separated from moral viewpoints by subjective value judgments. To pretend otherwise is to play into the hands of the religionists, to open us up to the threat of tyranny, to call into question our concepts of individual civil, constitutional, and human rights, and to provoke a societal existential crisis. Instead of religious wars, we will have morality wars. Instead of prophets in possession of the one true revealed scripture/religion, we will have scientists who are able to divine morality from indifferent facts and extract policy from apathetic data.

Do we want judges engaged in gleaning nonexistent moral truth from the evidence presented in their courtrooms? The judiciary has been moving away from any incorporation of concepts of morality in judicial decision-making and as a valid basis for legislation. The line of recent cases, including **Indian Hotels and Restaurants Association (AHAR) & Anr. V. The State of Maharashtra & Ors.** Hon'ble Supreme Court said "*It needs to be borne in mind that there may be certain activities which the society perceives as immoral per se. It may include gambling (though that is also becoming a debatable issue now), prostitution etc. It is also to be noted that standards of morality in a society change with the passage of time. A particular activity, which was treated as immoral few decades ago may not be so now. Societal norms keep changing. Social change is of two types: continuous or evolutionary and discontinuous or revolutionary. The most common form of change is continuous. This day-to-day incremental change is a subtle, but dynamic, factor in social analysis. It cannot be denied that dance performances, in dignified forms, are socially acceptable and nobody takes exceptions to the same. On the other hand, obscenity is treated as immoral. Therefore, obscene dance performance may not be acceptable and the State can pass a law prohibiting obscene dances.*

However, a practice which may not be immoral by societal standards cannot be thrust upon the society as immoral by the State with its own notion of morality and thereby exercise 'social control' While quashing the condition imposed that the liquor cannot be served at such places where dances are staged, the bench said that such stipulations are totally disproportionate, unreasonable and arbitrary. It said: "It seems that State is more influenced by moralistic overtones under wrong presumption that persons after consuming alcohol would misbehave with the dancers. If this is so, such a presumption would be equally applicable to bar rooms where the alcohol is served by women waitresses. However, such conditions have been held to be unreasonable by the Courts. There may be aberrations or sporadic incidents of this nature which can happen not only at the places where dance performances are staged but at other places including bar rooms and even main restaurants. Other measures have to be adopted to check such a nuance. There cannot be a complete prohibition from serving alcoholic beverages."

Q. Explain Kelsen's 'Theory of Pure Law'.

Hans Kelsen (d. 1973) was an Austrian jurist, legal philosopher and political philosopher belonging to Legal Positivism school of thought. Roscoe Pound lauded Kelsen as "undoubtedly the leading jurist of the time."

"PURE" Theory of Law: In the third paragraph of the opening chapter of his book, Kelsen himself gives the reason for calling his theory as "Pure". He writes: "It is called a 'pure' theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law; Its aim is to free the science of law from alien elements. This is the methodological basis of the theory."

Definition of Law: Kelsen defined 'law' in following two headings.

Law: An Order of Human Behaviour: "When we compare the objects that have been designated by the word "law" by different peoples at different times, we see that all these objects turn out to be 'orders of human behavior'."

Law: A Coercive Order "A second characteristic is that they are 'coercive orders'. This means that they react against certain events, regarded as undesirable because detrimental to society, specially against human behavior of this kind, with a coercive act; that is to say, by inflicting on the responsible individual an evil – such as deprivation of life, health, liberty or economic values – which if necessary, is imposed upon the affected individual even against his will by the employment of physical force."

In simple words, we can say that 'law' according to Kelsen is: "Orders of human behavior that react against certain events, regarded as detrimental against such orders of human behavior, with a coercive act."

Salient Features of Kelsen's Pure Theory of Law

1. **Law as Science:** Kelsen tried to present a theory that could be attempted to convert law into a science, a theory that could be understood through logic.
2. **As a Positive Law:** In the first paragraph of *Pure Theory of Law*, Kelsen introduces his theory as being a theory of positive law. This theory of positive law is then presented by Kelsen as forming a hierarchy of laws which start from a Basic Norm, i.e. 'Grundnorm' where all other norms are related to each other by either being inferior norms.
3. **Law "As it is":** Kelsen emphasized that analysis must focus on law as 'it is' actually laid down, and not as 'it ought to be'.

4. **Law Contains set of Rules:** Kelsen emphasized that the Law contains mass of rules, and a theory should organize them in an ordered pattern.
5. **Law and Morality:** Kelsen's strict separation of law and morality, is an integral part of his presentation of the Pure Theory of Law. The application of the law, in order to be protected from moral influence or political influence, needed to be safeguarded by its separation from the sphere of conventional moral influence or political influence. Kelsen did not deny that moral discussion was still possible and even to be encouraged in the sociological domain of inter-subjective activity. However, the Pure Theory of Law was not to be subject to such influences.
6. **Theory of Law should be Uniform:** According to Kelsen, the theory of law should be applicable at all times and all places.
7. **Law is 'Ought' Proposition:** A norm is a proposition or an if statement: "If A happens, then B is ought to happen." Thus: "If someone commits a theft, the judge ought to punish him." A legal system is composed of series of such norms.
8. **Static Aspect of Law:** Kelsen distinguished the static theory of law from the dynamic theory of law. The static theory of law represented the law as a hierarchy of laws where the individual laws were related the one to the other as either being inferior, the one to the other, or superior with respect to each other.
9. **Dynamic State of Law:** Kelsen discussed the dynamic theory of law. In the dynamic theory of law, the static theory of law comes into direct contact with the governmental administration of the state which must recognize the function of the legislature in the writing of new law. At the same time there is also the understanding of law as being affected by the accumulated standing law which represents the decisions of the courts which in principle become part of the hierarchical representation of the pure theory of law. Importantly, Kelsen allows for the legislative process to recognize the law as the product of political and ethical debate which is the product of the activity of the legislature before it becomes part of the domain of the static theory of law.

Basic Core of Kelsen's Theory – "The Grundnorm"

The law according to Kelsen is a system of norms. He maintained that legal norms are created by acts of will or in other words, products of deliberate human action, as opposed to moral norms which is by God. In relation to this, the pure law theory takes only into consideration only the norms created by the acts of human beings, not norms which come from other superhuman authorities.

Central to the Pure Theory of Law is the notion of a "basic norm" – The Grundnorm — a hypothetical norm, presupposed by the jurist, from which in a hierarchy all 'lower' norms in a legal system, beginning with constitutional law, are understood to derive their authority or 'bindingness'. In this way, Kelsen contends, the bindingness of legal norms, their specifically 'legal' character, can be best understood without tracing it ultimately to some suprahuman source such as God, personified Nature or — of great importance in his time — a personified State or Nation.

The "Ought": When laws are described as "commands" or expressions of the "will" of the legislature, and when the legal order as such is said to be the "command" or the "will" of the State, this must be understood as a figurative mode of speech. As usual, as analogy is responsible for the figurative statement. The situation when a rule of law "stipulates", "provides for", or "prescribes" a certain human conduct is in fact quite similar to situation when one individual wants another individual to behave in such-and-such a way and expresses this will in the form of a command. The only difference is that when we say that certain human conduct is "stipulated", "provided for", or "prescribed" by a rule of law, we are employing an abstraction which eliminates the psychological act of will which is expressed by a command. If the rule of law is a command, it is, so to speak, a de-psychologised command, a

command which does not imply a “will” in psychological sense of the term. The conduct prescribed by the rule of law is “determined” without any human being having to “will” it in a psychological sense. This is expressed by the statement that one “shall”, one “ought” to observe the conduct prescribed by the law. A “norm” is a rule expressing the fact that somebody ought to act in a certain way, without implying that anybody really “wants” the person to act that way.

Function of Norms Within the Legal System: According to Kelsen, a legal system is not a collection of “oughts”, but a hierarchy descending downwards from a “Grundnorm”. According to him, in a legal system, norms are to have following functions.

1. **“Maintenance of Peace” – The Purpose of Law** Kelsen insisted that the task of positive law is not justice, but maintenance of peace. For this, a monopolization of force is necessary, which can be the only function of law. Kelsen rejects the general approach to law of looking at the purposes and functions, by arguing that all such matters are psychological or political matters.
2. **Propositions of Law** According to Kelsen legal propositions deal with what ‘ought to be’. Thus, in law, if a person steals, he ought to be punished.
3. **“Legal” Oughts** For Kelsen “oughts” of law are distinguishable from “oughts” of valuation. For him “oughts” of legal nature bring with themselves sanctions in case of their breach.
4. **Legal Oughts Backed by the State Force** According to Kelsen, legal orders focus more on the element of disobedience, as compared to the norms of other orders which may focus more on the element of obedience. Therefore, disobedience to legal norm is backed by sanction by the State. Thus, the Pure Theory recommends that the Positive Law should be viewed as a system of norms stipulating, that under certain conditions, a coercive measure is ought to be taken.

Validation of Norms

According to Kelsen, there must be some *Norm*, that validates all other norms, and such *Norm* is to be called as the Grundnorm. He insisted that the grundnorm need not to be same in every legal system, but some grundnorm will always be there, whether it’s the constitution or the will of dictator. 1 He further argued that there could be more than one grundnorm, like in Britain, there are three grundnorms: *statute*, *precedent* and *custom*. But, the requirement for having more than one grundnorms is that they must not be in conflict with each other.

Critical Analysis

1. Kelsen’s theory points out that the Grundnorm is presupposition that the constitution ought to be obeyed. The constitution of a country is a sociological, political document and so the Grundnorm is not pure.
2. Kelsen also pointed out that law should be kept free from morality. A general question should be raised here, whether is it possible to keep law free from morality? Kelsen made emphasis in the effective of law and by this way he indirectly accepted the morality as a part of effectiveness.
3. Kelsen attempted to convert law into a science, a theory that could be understood through logic, but on the other hand he insisted on the validity of the grundnorm to be “assumed”, rather than based upon some “logic”.
4. Kelsen attempted to locate law and legal norms in a middle realm between absolute moral values and social facts. Hence, the denial of the relevance of moral considerations makes legal science sterile and useless, and the denial of the factual nature of law disconnects it from reality.

Conclusion: Hans Kelsen, one of the most influential legal philosophers of the last century has contributed to the answering of certain fundamental questions about law. The first of these is the relation of law to theories of what the law should be, on the one hand, and to the institutions, practices and mores of its society, on the other. The second aspect in Kelsen's theory is that the whole system is interconnected with each other in the form of a hierarchy of norms, and there is a basic norm which stands at the top of this hierarchy called the grundnorm, which is of the highest order, and the validity of this grundnorm is to be 'supposed'. All other norms derive their validity from this grundnorm, and no one can question the validity of this grundnorm. Another aspect of Kelsen's theory is that it presents us with a dynamic legal order rather than a merely static one. The law tends to be orderly through maintaining consistency between its various parts, through the broadening and simplifying of principles and conceptual compartments and, in short, through tending to become a logical system, a perfect and complete logical system.

Q. Discuss the basic thoughts of Natural Law Theory with its drawbacks, if any.

Natural law theory is one of the oldest theories among all the theories. Thus these laws are popularly said to be god made laws. It is said to be emanated from supreme source as observed by many jurist and philosophers. Legal thinkers have expressed diverse views on behalf of natural law. Natural law philosophy dominated the Greece during 5th century BC when it was believed it was eternal to man. Sophist calls it as an order of things embodies reason.

Later philosophers such as St. Thomas Aquinas, Thomas Hobbes, and John Locke built on the work of the Greeks in natural law theory treatises of their own. Many of these philosophers used natural law as a framework for criticizing and reforming positive laws, arguing that positive laws which are unjust under the principles of natural law are legally wanting. The entire history of natural law reveals an attempt by the jurists to provide the concept and contents of natural law in human existence.

2) Development of natural law theory:- A brief discussion on natural law theory shall be presented in the historical order to give an idea of the various ideologies that it tried to establish from time to time and its effect on law. Natural law theories may be broadly divided into four classes:-

- a) Ancient period
- b) Medieval period
- c) Period of renaissance
- d) Modern period

A) ANCIENT PERIOD:- The concept of natural law theory was developed by Greek philosophers around 4th century BC and laid down the essential features.

Heraclitus:- Heraclitus was the first Greek Philosopher who pointed three main characteristics of natural law namely, destiny, order and reason. He stated that nature is not scattered heap of things but there is a definite relation between things and a definite order and rhythm of events. According to him "reason" is one of the essential elements of the natural law. The instability and frequent changes in the early small states of Greece made legal philosophers to think that law was meant to serve the interest of those who were in power and the people are continually struggling for better life. This unstable political condition gave birth to idea of natural law.

Socrates:- Socrates said that like natural physical law there is a natural law. Man possesses insight which reveals to him the goodness and badness of things and makes him to know the absolute and eternal moral rules. This human insight is the basis to judge the law. Socrates did not say if the positive law is not in conformity with moral law it would be disobeyed. According to him it was rather appeal of insight to obey it and perhaps that was why he preferred to drink poison in obedience to law than to run away from the prison. This theory was a plea for security and stability which was one of the principle needs of the age. His people Plato supported the same theory but it is in Aristotle that we find a proper elaboration of the theory.

Plato:- Socrates disciple plato carried further the natural law theory further through his concept of ideal state which he termed as republic. He contended that only intelligent and worthy person should be king. He argued that justice lies in ordinating means life through reason and wisdom and motivating him to control his passion and desires. In his republic Plato emphasize the need for perfect division of labour and held that each men oath to do his work which he is called upon by his capacities. According to plato law of states are a pale shadow of an absolute idea of an perfect laws against which man made law may be measured.

Aristotle:- According to him man is a part of nature in two ways first he is the part of the creature of god and second he posses active reason by which he can shape his will. By his reason men can discovered the eternal principles of justice the men"s region being the part of nature the law discovered by reason is called natural justice. Aristotle defines natural justice as that which everywhere has the same force and that not exist by the people thinking this or that. So far as its relation which positive law or legal justice is concern, he said that legal justice in that which is originally indifferent but when it has been laid down is not indifferent.

Rome:- The theory expanded by Stoics had a great influence on the contemporary roman legal system. The Romans did not confine their study of natural law theory merely to theoretical discussion but carried it further to give it a practical shape by transforming their rigid legal system into cosmopolitan living law. The natural law philosophy found an expression in the roman legal system through division of Roman law into three distinct division namely Jus Civile, Jus Gentium and Jus Naturale.

B) MEDIEVAL PERIOD:- This period starts from 12th century to mid 14th century in the European history. This period was dominated by Ecclesiastical doctrines which the Christian fathers propagated for establishment of church over the states. The Christian saints especially Ambrose, St. Augustine and Gregory propagated a view that divine law was superior to all other laws. According to them all laws are either divine or human. St. Thomas Aquinas defined the law as "an ordinance of reason for the common good made by him who has the care of the community and promulgated through reason" he classified law as:- i) Law of God or external law, ii) Natural law revealed through reason, iii) Divine law or law of scriptures, iv) Human laws which we now called Positive law.

C) PERIOD OF RENAISSANCE:- This period in the history of development of natural law may also be called the modern classical era which is marked by rationalism and emergence of new ideas in different fields of knowledge. General awakening among the masses coupled with new discoveries of science during the 14th and 15th centuries shattered the foundation of the established values. The natural law theory propounded by Hugo Grotious, Locke and Rousseau revolutionised the existing institutions and held that social contract was the basis of the society.

Hugo Grotious:- He propounded the theory of functional natural law and formulated the principles of international law which were equally applicable to all states both during war and peace and he is considered as the founder of modern international law. He therefore treated "Natural Law as immutable which cannot be changed by god himself"

Thomas Hobbes:- Hobbes theory of natural law was based on natural right of self preservation of person and property. He made use of natural law to justify the absolute authority of the ruler by endowing him power to protect his subject.

Rousseau:- Social contract is not a historical fact but hypothetical construction of reason. The essence of Rousseau theory of general will was that while the individual parts with his natural rights, in return he gets civil liberties such as freedom of speech equality, assembly etc. His natural law theory is confined to the freedom and liberty of the individual. For him, state, law, sovereignty, general will etc are interchangeable terms. His theory is considered to be the forerunner of the modern jurisprudential thought and legal theory.

Locke:- He put emphasis on right to life, liberty and property which is inalienable rights and necessary for the well being of the individual. He said that there should not be any law contravening the above rights.

D) MODERN PERIOD:- The natural law theory received a set back in the wake of 19th century pragmatism. The proponent of analytical positivism, notably Bentham and Austin rejected natural law on the ground that it was ambiguous and misleading. Bentham called it a simple nonsense since absolute equality and absolute liberty were repugnant to the existence of the state. The doctrines propagated by Austin and Bentham completely divorced morality from law. All these developments shattered the very foundation of the natural law theory in 19th century. Later in the 21st century there was revival of natural law school where jurists like Stammler, Fuller and Finnis had made their contribution towards the revival of this school.

Natural Law theory and its influence in Indian laws relating to Fundamental rights { Article 14,19 and 21} and case laws relating to it:-

In Indian laws especially in Indian constitution there has been a largely impact of natural law theory. The articles like Article 14, 19 and 21 have been widely interpreted in the Indian scenario especially by the Indian judiciary. This could be found through the case laws

In the case of **Air India V/S Nargis Mirza** the Supreme Court had struck down the Air India and Indian Airlines regulations on the retirement and pregnancy bar on the services of airhostess as unconstitutional on the ground that the regulations were arbitrary and unconstitutional under Article 14 of the Indian constitution.

Now if one analyzes Stammler's four point principle with special reference to "principles of respect" : 1) the content of the person's volition must not be against the arbitrary will of another. Thus in this case the natural law theory has been applied by Indian Judiciary.

In the case of **Maneka Gandhi V/S Union of India** the meaning and content life and personal liberty under article 21 of Indian constitution came up for consideration and the supreme court held that the law established by the state should be just fair and reasonable .

If one analyses the judgement one would find reference of LOCKE'S theory whereby the natural rights of man such as right to life, liberty and property remained with him. So in Maneka Gandhi case also the natural law theory principles could be evolved.

In case of Indian **Express Newspaper V/S Union of India** the theory of Rousseau in which he mentioned of freedom and liberty (freedom of speech and expression) has been applied, the Rousseau's theory of freedom of speech and expression was said to be natural right of every citizen by the Supreme court which is also been conferred upon under Article 19 of Indian constitution, wherein the freedom of speech and expression is said to be among the basic right of a human being to live in a society with dignity.

To guarantee and promote fundamental rights and freedoms of the citizens and the respect for the principles of the democratic state based on rule of law. The popular Habeas Corpus case **ADM Jabalpur V/S Shivakant Shukla** is one of the important cases when it comes to rule of law. In this case the question was whether there was any rule of law in India apart from article 21. This was in context of suspension of enforcement of Art. 14, 21 and 22 during the proclamation of emergency. The answer is even in absence of article 21 of constitution the right to life and liberty of a person could not be deprived without authority of law. Without such sanity of life and liberty the distinction between lawless society and one governed by laws would cease to have meaning.

Thus in this case Stammler's four point principle with special reference to "principles of respect" : 1) the content of the person's volition must not be against the arbitrary will of another. Thus in this case the natural law theory has been applied by Indian Judiciary.

Moreover the fundamental rights conferred under Indian constitution have a large base in natural law theory. Almost all the fundamental rights conferred under Indian constitution relates to natural law as all the fundamental right are the basic rights of a human being which the natural law theory tries to confer upon the society since age of Greeks. All the thinking of those theorists under natural law theory have influenced Indian laws to a large extent, not only fundamental right but even many more provisions under Indian constitution are influenced by the natural law theory.

CRITICISMS OF NATURAL LAW:- The natural law is based on reason, law could not be based only on reason but instead legislature and other source should also be considered. The tradition, customs moral values, judge made laws, society also should be taken into account which is not emphasised in natural law theory.

During the Medieval Period wherein church was the absolute to make rules or law whereby they said that Law is divine and made by God himself is not acceptable to many theorists according to medieval period theorist the church made laws are supreme and laws are Law of God or external law divine law or law of scriptures is not justified as those era Church tried dominating the whole of Europe saying the supremacy of law rather it is made by the Church fathers and it may be called as law made by fathers. Although law may be of a divine origin but all laws in the society could not be made by divine, even society makes law by its customs and traditions. As Thomas Aquinas said that law is a law of God or eternal law but we see the legal implications in modern world the God made laws although playing an important role in legal system but it is not extensive as he have failed to give light on the scope of modern scenario where the Judge made law, customary laws, king made laws has its own role to play.

Thomas Hobbes natural law theory of self-preservation of person and property and his saying of endowing the rights to absolute authority is not justified as we had seen in the past events that endowing the absolute power to authority leaves peoples in tyranny or monarchy where the absolute power had spoiled many societies in the history and if it is implied in the present day the same situation may replay. The monarch may exploit the society for his selfish needs. Thus Thomas Aquinas saying of giving absolute power is not much applicable in the modern society. As modern society needs everyone to be equal wherein giving absolute power to some authority may create chaos in the society. It may also lead to revolution as we have seen that after any vesting of absolute power to any authority the authority tries to exploit the subjects thus the revolution starts among the subjects to being down the absoluteness of power vested in the authority.

For eg:- In India the theory was applied in the old age wherein the poor farmers took shelter for protection under the Jamindars to escape from being killed or exploited by others. The Jamindars as time passed became very powerful and they became the absolute power authority as the absolute rights of the famers are being vested in them. Jaminders had started to exploit the poor farmers and took away land and amenities leaving nothing to them but to get more exploited in hands of those Jaminders. Thus then the revolution against the Jaminders had started

wherein all the poor farmers being exhausted of all the atrocities by those Jamindars came along. They tried to take back their rights which were endowed to the Jaminders for their protection.

Thus it is evident from the history that giving absolute power to an authority results in being exploited by that authority. So we can say that Thomas Hobbes is not justified in saying of endowing absolute power to an authority which may lead to abuse of power by that authority.

Indian constitution provides for emergency provisions wherein Fundamental rights are being curtailed. Fundamental rights being the natural rights or the most essential rights for human existence like freedom of speech and expression and many other rights being curtailed. Thus sometimes the theory of natural law is being denied as for the wellbeing of the society. Other than the above rights even right to life is being the most essential right as natural law is infringed by way of **Special power for armed forces(Special power)Act 1958**. Which depicts that natural law theories are not exclusive but some act should be done against it for the welfare of the society.

The natural law theory saying „ought to be“ may not always confirm to the needs of the society. For instance it is natural to beget children as it is natural but there is some restrictions in those natural right as to the number of children in conformity with Indian laws such as family planning measures etc. So the natural right may not be superior always.

The concept of morality in natural law theory is of great importance but this theory is not applicable as such it may happen in Indian laws as according to Muslim law marring 3 wife is moral but in Indian law it is immoral. Thus the theory of morality as said in natural law theory is not applicable in all times or in all aspects.

CONCLUSION:- Apart from its criticism the use of natural law has been prevalent since ages, even in the present legal system the natural law is used extensively. The modern judicial system have been founded on the British Pattern the fine principles of equality, justice and good conscience and natural justice occupy an importance in Indian law. The higher values of universal validity, righteousness, duty, service to mankind, sacrifice, non-violence etc were already incorporated in ancient legal system . The principles of natural law are embodied in dharma referred to duties of man towards gods, sages, man and lower animals and creatures. It has been characterised as a belief in conservation of moral values. During the medieval period and British period in India natural law found its expression in religious preaching of Ramanuja, Sankara, nanak, swami Ramakrishna etc. During the Mughal period there was a temporary clash between the philosophies but after British invasion of India they tried to imply their laws over here, they started codification of laws denying the supremacy of old Indian laws.

As due to long rule of British in india and incorporation of their rules in here certain principles of English Natural law found its place in Indian laws. The principle of natural justice, the doctrine of bias, judicial review, reasoned decision and many other precepts of administrative laws are based on natural law.

It is also finds a prominent place in Directive principles of state policy and the fundamental right under Indian constitution in which various rights and duties are put up by the framers. The principles against double jeopardy and prohibition against self-incrimination embodies the principles if natural law theory.

In various landmark judgement delivered by Supreme Court of India the Supreme Court sleeked the help of Natural Law theory. The principle of natural justice was earlier confined to only judicial and quasi-judicial enquires and did not extent to administrative actions. But with the decision in Meneka Gandhi"s case the scope of natural justice extends to administrative actions. It is for the attainment of justice with regard to administrative functions.

The legal Administrative Tribunals, Family Courts, Consumer Redressal, Lok adalats, Human right commission, women"s commission etc. Has been introduced by Indian legal system to provide social justice and speedy relief to

aggrieved persons against injustices. The Supreme court contribution to human right jurisprudence through judicial activism and public interest litigation. These new developments are evident of the fact that principles of natural law and justice embody higher values of life, liberty, equality and justice have gained increasing importance in Indian legal system.

Thus we can say that although the theory of natural law is said to be vague and sometimes irrational but in Indian legal system the implication of Natural law theory has a great role to play.

Q. 'Law is the command of a sovereign, containing a common rule of life for his subjects and obliging them to obedience' – Discuss Austin's theory of Positivism.

Austin defined positive law as comprising of commands of a political sovereign backed by sanctions on the ones who disobey the commands.

There are primarily three key constituents of this concept of law:

1. Political sovereign
2. Command
3. Sanction

Austin noted that a society which does not have a political sovereign does not have law in the strict sense of positive law. Political sovereign was regarded as a necessary feature of a political society which considers or claims itself to be independent. Austin was of the notion that where there is no sovereign, there is no independent political society where as the vice versa is also true.

As pointed out by Austin, positive law is the result of a sovereign's command. A command is an imperative that creates a duty by the presence of a sanction which would follow if there is an incidence of non-compliance.⁸ Command is something which is of such importance that it can never be distinguished from duty and sanction and they can all be considered to be varied aspects of a single event. Where ever there exists a duty, there will also be the presence of a command; while where there is a command, there also is a duty. The duty arises from the existence of punishment or sanction of sorts which follow in case of non-compliance or when there is a breach of duty.

As pointed out by Austin, the three kinds of commonly termed laws that are not imperative, meaning, they are not laws properly so called but still they can justifiably be included within jurisprudence are:

1. Declaratory laws – Austin, in this point, conceded that imperative rules may be enacted in the guise of it being considered a declaration. The declaratory laws are those which do not go on to form new duties but only clarify or provide the interpretation of existing legal relations.
2. Laws brought in order to repeal law- The process of repealing some laws may impose new duties or they can even go on to revive some of the former laws. As per Austin, the Laws to repeal law are not imperative commands.
3. Laws of imperfect obligation – Austin stated that laws of imperfect obligation are those laws which do not have any sanctions attached for their breach or punishment which would follow in case of a non-compliance. An

illustration of laws falling under this category would be: the statutory duty of the city council to keep the streets clean and tidy.

As per Austin's definition, the laws creating rights and liberties are laws properly so called as they are imperative in nature. They are considered as imperative as they happen to create duties that are correlative on the part of other people to oblige to.

Austin also attempted to point out the differences between positive law and positive morality. As per Austin, moral rules that resemble positive law make up positive morality. There are various rules of positive morality that are co-extensive with rules of positive law. For example: rules against killing someone, stealing, raping, assaulting.

As per Austin, whenever there is a conflict between positive law and positive morality, positive law would prevail. Though Austin was a man who maintained that sovereign is bound to obey the divine law, he considered it to be a moral duty, and stated that even if the sovereign ever legislated against the divine law, it will still be the law. Austin further adds that any other view in this regard would not only be wrong but it would be pernicious as it could lead to anarchy.

Legal Positivism: Indian Perspective

The theory of Legal Positivism has been used by the judiciary in India while deciding landmark cases. Therefore, there have been cases in India where the judiciary has been influenced by the legal positivist school while giving the judgement. Therefore, there are cases where the judges have interpreted the law as has been laid down by the legislature. Therefore, the legal positivist school has played a great role in the Indian perspective also.

In the landmark judgement of **A. K. Gopalan v. State of Madras**, the petitioner was detained under the Preventive Detention Act. The petitioner challenged the constitutionality of the said act on the ground that the act infringed Article 19 as well as Article 21 of the Constitution of India. The argument put forward by the petitioner was that law not only means 'lex' but also 'jus'. Therefore, the law is not only what is laid down by the legislature but should also be just and fair. The Supreme Court upheld the validity of the Preventive Detention Act and stated that law is 'lex' and not 'jus'. Therefore, what is laid down by the legislature is to be regarded as the law of the land even if it is not just. This judgement clearly reflected the thinking of the positivist school.

Moreover, in the case of **R. K. Garg v. Union of India**, famously known as the Bearer Bond case, the legislature, which is the supreme authority which is entrusted with the power of making laws, passed a law that if black money was invested in certain government bonds within a stipulated period of time, the government would not question with regard to the source of the black money. This law was challenged on the ground of arbitrariness under Article 14 of the Constitution of India and it was argued that this particular piece of legislation was encouraging the evasion of taxes. The court upheld the validity of the law as it is and said that there is an intelligible differentia between those who invest in bonds and those who do not. Moreover, it applied the Doctrine of Pith and Substance, and stated that the purpose of the legislation was not to encourage the evasion of the taxes but to use the black money for productive purposes. Therefore, the law as it is was held to be valid by the Supreme Court.

Moreover, the theory of legal positivism was also applied by the apex court in the case of **Jolly George Verghese v. The Bank of Cochin**, where a law which stated that there would be imprisonment in case a person fails to repay a debt was held to be valid by the Supreme Court despite it being against the United Nation Convention. Therefore, the Supreme Court analysed the law as laid down by the legislature and gave the decision.

Therefore, in all the above cases, the court did not look into the matter whether the law is just or not; it only considered what the law is. Therefore, the thinking of the Legal Positivist School has been incorporated by the Indian Judges while giving judgements and therefore, legal positivism plays a crucial role in the Indian context as well.

Q. Discuss Jeremy Bentham's principle of utility and compare it with Austin's Positive law

Jeremy Bentham, the English jurist and philosopher, is regarded as the greatest figure in the history of British Legal positivism. In simple terms, Bentham's definition of law can be given as the will of the sovereign. He was of the opinion that rules which are derived exclusively from the commands of a sovereign authority form the law of the land. Therefore, he stated that rules which are derived from the will of the sovereign would produce more clear as well as more certain laws than the rules which are generated within a common law system.

Therefore, according to Jeremy Bentham, *'law is defined as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or a class of persons, who in the case in question are subject to his power'*.

Therefore, Bentham clearly states that law, which is the will of the sovereign, regulates the conduct of the people to which it applies. Therefore, the law is what is laid down by the sovereign. The people who are subject to the law have to regulate their conduct in accordance with this will of the sovereign. Moreover, Bentham says that the law does not have to be in consonance with the principles of ethics. Therefore, law is whatever is laid down by the sovereign.

According to the Bentham, a sovereign is the highest superior body which does not owe any obedience to any other body. It is the sovereign which claims habitual obedience from the people living in a politically organized group. Therefore, the sovereign does not owe any allegiance to any other body or group. It is the will of this sovereign body which is known as law.

Bentham, however, states that the power of the sovereign is not absolute as is the view of John Austin. Bentham is of the view that the power of the sovereign can be limited as well as divided. Therefore, he is of the opinion that a sovereign can, by his own will, limit his own powers by entering into agreements with certain external agencies which would put restriction on the power of the sovereign. Jeremy Bentham's concept of sovereignty is not absolute in nature and can be restricted to a certain extent.

Another important feature of law according to Bentham is that it should be backed by sanctions. Therefore, the will of the sovereign must always be backed up by sanctions for it to become law. Bentham talked about the positive as well as negative side of sanctions, unlike Austin, who only talked about the negative side of it. Bentham was of the view that rewards should be given to the people who follow the law while punishments should be inflicted upon those who break the law. This was to encourage people to be law abiding and moreover, discourage them to break the law. Therefore, according to Bentham, law is the will of the sovereign backed by sanctions.

Principle of Utility

Jeremy Bentham also gave his famous theory of utility. According to Bentham, any person is governed by two masters, that is, pain and pleasure. Every man wants to increase the pleasure and diminish the pain. Therefore, any law should be made by keeping in mind this theory of utility. Every law should be promulgated by the sovereign in such a way that it diminishes the pain and maximises the pleasure of the people who would be governed by that particular law. Therefore, every law should be measured by the yardstick of public utility, that is, how much pain is

it causing to the people and how much pleasure is the person getting from the law. Any law should aim at maximising pleasure and minimising the pain of the persons whom it governs.

Along with the Principle of Utility, Jeremy Bentham proposed the codification of all the laws and stated that the uncodified body of rules that was part of the English Law was not worthy of being called as law.

Therefore, Jeremy Bentham played a crucial role in the development of the theory of Legal Positivism.

Differences Between Austin and Bentham

Bentham was against the idea that scriptures were a source of law; he believed that the will of God is unknowable. Conversely, Austin regarded the law of God as revealed in the scriptures to be a primary source of moral rules.

The definition of the term sovereignty as provided by Austin talks about external aspects as well as internal aspects of sovereignty while the definition given by Bentham speaks only about internal aspect of sovereignty.

Austin only talks about the negative aspect of the sanctions; as per Austin, you ought to follow the law, but if you happen to break the law, you will be punished accordingly. Bentham believed that as every man wants to increase his pleasure and diminish pain and thus to encourage people to be more law abiding and discourage people from breaking the law there should be the inclusion of awards as well as punishment for people depending upon their behaviour.

As per Bentham, a sovereign by its own will, may put limits on its sovereignty by entering into agreements with external agencies, but Austin is opposed to this placing of limits on sovereign's powers and does not allow for it.

There was another sphere where Austin had a major disagreement with Bentham. As per Bentham's ideology, courts have no role to play in legal development. However, Austin had different ideas. Austin's utilitarianism leads him into the belief that judicial law making is not only inevitable but is also an unequivocal public good.

The common law, as defined by Austin, is a law made by the sovereigns through their delegates who are the judges. Austin reasoned that judges are mere agents of the sovereign, authorised to adjudicate disputes and to supply a rule where there exists a requirement of one. Austin has a complaint against the judiciary not because of their act of legislating but because of their act of legislating too cautiously. Austin, unlike Bentham, accepted the process of judicial law making and considered it as immensely beneficial and even absolutely necessary.

Criticism of Austin and Bentham

The view of John Austin and Jeremy Bentham that Law is the command of the sovereign backed by sanctions had certain shortcomings and therefore, was criticized to a certain extent.

According to John Austin, the Sovereign is supreme and owes allegiance to nobody else. However, the concept of International Law is a restriction on the external sovereignty of the determinate superior. The sovereign has limited powers due to the rules, regulations and treaties which form part of the International Law. Therefore, the idea that Sovereignty is supreme and absolute is challenged by the concept of International Law. Moreover, the fundamental rights given to the people restrict the powers of the sovereign and therefore, are a challenge to the internal sovereignty of the determinate superior. The sovereign has to exercise its powers according to the fundamental rights of the people and therefore, the sovereign cannot breach the rights of the people while exercising its powers. Therefore, fundamental rights also challenge the absolute character of sovereignty.

John Austin and Jeremy Bentham never talked about the concept of a legal system, which is prevalent almost all over the world in the modern era. They only talked about the concept of a sovereign and the sovereign being the source of the laws. The concept of a legal system was never discussed.

Moreover, the idea of the sovereign given by both the jurists gives rise to an autocratic regime since the sovereign is supreme and has absolute powers. Since the sovereign does not owe any allegiance to any other person or group of persons, it has the power to act as it wants and therefore, there are no restrictions on the powers of the sovereign. Therefore, the concept of sovereign gave rise to the idea of autocratic regime.

One of the primary shortcomings of the two jurists was the fact that they regarded sanctions as the only basis of law. They believed that the existence of law is not possible without it being backed by sanctions. Therefore, if the will of the sovereign is not backed by sanctions, it would not be called as law

Q. What is mean by Sociological Jurisprudence? Critically evaluate Roscoe Pound's theory of "Social Engineering".

The relation between the individual, society and the State have been changing and various theories regarding them have been propounded from time to time. In the beginning, society was governed by customs which had only social sanction. Then came the supremacy of the priests. After that, the secular state emerged and dominated all the institutions. As a reaction, the importance of individual was asserted by thinkers and philosophers. There were revolutions and political changes. The necessity of balancing the welfare of the society and individual was realized.

Society and human life always go together. From childhood to till old age, every human being expects that his or her desire is to be fulfilled for which their arise conflict of desires or claims which comes under the term "interest". It is impossible to fulfill all the desires of a human being. So to fulfill the desires of maximum human being for the welfare of society the concept of Social Engineering was emerged and which was coined by Roscoe Pound. Social engineering is based on the theory that laws are created to shape the society and regulate the people's behavior. It is an attempt to control the human conduct through the help of Law.

According to Pound, "*Law is social engineering which means a balance between the competing interests in society,*" in which applied science are used for resolving individual and social problems.

For the purpose of maintaining the legal framework and its proper functioning, certain interest needs to be considered like individual interests, public and social interests, a definition of limits within which such interests will be recognized and given effect to, and the securing of those interest within the limits as defined.

When determining the scope and subject matter of the system, the following things have to be done:

- Preparation of an inventory of interests, classifying them,
- Selection of the interests which should be legally recognized,
- Demarcation of the limits of securing the interests so selected,
- Consideration of the means whereby laws might secure the interests when those have been acknowledged and delimited, and
- Evolution of the principles of valuation of interests.

Theory of Social Engineering: Pound compared the task of the lawyer to the engineers. He stated that the aim of social engineering is to build a structure of society as possible which requires the fulfillment or satisfaction of maximum wants with minimum usage of resources. It involves the balancing of competing interests. He called this theory as the theory of “*Social Engineering*.”

Here Pound has used two words i.e. “Social” which means group of individual forming a society. The second word is “Engineering” which means applied science carried out by engineers to produce finished products, based on continuous experimentation and experience to get the finished product by means of an instrument or device.

For facilitating the tasks of social engineering, Pound classified various interests to be protected by law in three heads:

1. Private Interests / Individual Interest– Individual interests, according to Pound are claims, or demands or desires from the point of the individual. Individual interests according to Pound includes:

a. Personality- interest of personality consist of interests in –

- The physical person,
- Freedom of will,
- Honour and reputation, • Privacy and sensibilities,
- Belief and opinion.

b. Domestic relations – it is important to distinguish between the interest of individuals in domestic relationships and that of society in such institutions as family and marriage. Individual interests include those of :

- Parents and Children, • Husbands and Wives &
- Marital interests.

c. Interest of substance- this includes

- Interests of property,
- Succession and testamentary disposition,
- Freedom of industry and contract,
- Promised advantages
- Advantageous relations with others,
- Freedom of association, and
- Continuity of employment

2. Public Interest– Public interests according to him are the claims or demands or desires looked at from the stand point life in politically organized society. The main public interest according to Roscoe pound are :

a. Interests of state as a juristic person which includes

Interests of state as a juristic person i.e. protection

Claims of the politically organized society as a corporation to property acquired and held for corporate purposes.

b. Interests of State as a guardian of social interest, namely superintendence and administration of trusts, charitable endowments, protection of natural environment, territorial waters, sea-shores, regulation of public employment and so on to make use of thing which are open to public use, this interest seem to overlap with social interests.

3. Social Interest : Social interests are the claim or demands or desires thought of in terms of social life and generalized as claims of social groups. Social interests are said to include :

a. Social interest in general security -Social interest in the general security embraces those branches of the law which relate to

- General safety,
- General health,
- Peace and order,
- Security of acquisitions and
- Security of transactions.

b. Social interest in the security of social institutions- Social interest in the security of the social institutions include

- General security of domestic institutions, • Religious institutions, political institution and
- Economic institutions.

c. Social interest in general morals – Social interest in general morals comprises of prevention and prohibition of prostitution, drunkenness, gambling, etc.

d. Social interest in conservation of social resources- Social interests in the conservation of social resources covers conservation of social resources and protection and training of dependents and defectives, i.e., conservation of human resources, protective and education of dependents and defectives, reformation of delinquents, protection of economically dependents.

e. Social interest in general progress – Social interest in general progress has three aspects. Economic progress, political progress and cultural progress.

1. **Political progress** covers free speech and free association, free opinion, free criticisms.
2. **Economic progress** covers freedom of use and sale of property, free trade, free industry and encouragement of inventions by the grant of patents.

3. **Cultural progress** covers free science, free letters, encouragements of arts and letters, encouragements of higher education and learning and aesthetics

f. **Social interest in individual life.**- Meaning thereby each individual be able to live a human life according to the individual's

1. Political life
2. Physical life
3. Cultural
4. Social and
5. Economic life.

Jural Postulates Of Roscoe Pound

In order to evaluate the conflicting interests in due order of priority, Pound suggested that every society has certain basic assumption upon which its ordering rests, though for most of the time they may be implicit rather than expressly formulated. This assumption may be called as *jural postulates of the legal system of that society*.

Pound has mentioned five jural postulates as follows-

1. **Jural postulate I**— in civilised society men must be able to assume that others will commit no intentional aggression upon them.
2. **Jural postulate II**— in civilised society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated to their own use, what they have created by their own labour and what they have created by their own labour and what they have acquired under the existing social and economic order.
3. **Jural postulate III** — In a civilized society men must be able to assume that those with whom they deal as a member of the society will act in good faith and hence-
4. Will make good reasonable expectations which their promises or other conduct reasonably create;
5. Will carry out their undertaking according to the expectations which the moral sentiment of the community attaches thereto.
6. Will restore specifically or by equivalent what comes to them by mistake, or failure of the presuppositions of a transaction, or other unanticipated situation whereby they receive at other's expense what they could not reasonably have expected to receive under the actual circumstances.
7. **Jural postulate IV**— in civilized society men must be able to assume that those who engage in some course of conduct will act with due care not to cast an unreasonable risk of injury upon others.
8. **Jural postulate V**-in a civilized society men must be able to assume that others who maintain things or employ agencies, harmless in the sphere of their use but harmful in their normal action elsewhere, and

having a natural tendency to cross the boundaries of their proper use will restrain them and keep them within their proper bounds.

Pounds confessed that these jural postulates are not absolute but they have relative value. These are ideal standards which law should pursue in society they are of a changing nature and new postulates may emerge if the changes in society so warrant. Thus the jural postulates by Roscoe Pound provide guidelines for civilized life and they also seek to strike a balance between reality and idealism as also power and social accountability of men in the community.

CONCLUSION: It is concluded that law plays an important role in adjusting conflict of interests. Both the social interest and individual interest co-exist. Both of them have equal priority. Roscoe Pound has given the idea of Social Engineering for the American Society but this concept is followed universally for dispute resolution. India also followed the same concept in establishing a societal welfare. Both Judiciary and Legislators play an important role in enacting the statutes which fulfill the various desires of human being. In this techsavvy society desires of human being grows and to fulfill their desires new policies, strategy has been developed.

Q. Describe the sources of Law in Jurisprudential perspectives.

Source always gives us the understanding of the objective behind the formation of something. Everything in this universe has a source which carries its authenticity. Without a source, everything loses its importance. We all are very well acquainted with the word **"LAW"** and is used in our day to day life.

The phrase **'law'** has been derived from the Teutonic phrase **'Lag, this means that 'specific'**. In this foundation, the law may be described as a specific rule of demeanor and human relations. It additionally approaches a uniform rule of conduct that's applicable equally to all the human beings of the state. The law prescribes and regulates well-known situations of human pastime inside the kingdom.

1. ***"law is the command of the sovereign."*** "it is the command of the advanced to an inferior and pressure is the sanction at the back of law." —Austin
2. ***"A regulation is a popular rule of outside behaviour enforced with the aid of a sovereign political authority."*** —Holland
3. ***"Law is the body of principles recognized and applied by the State in the administration of justice."*** —Salmond

Definition by Indian philosophers

Ancient India represented a distinct tradition of the law and had a historically independent school of legal theory and practice. The **Arthashastra, dating from 400 BC** and the **Manusmriti, from 100 AD**, were influential treatises in India, texts that were considered authoritative legal guidance. Manu's central philosophy was tolerance and pluralism and was cited across Southeast Asia

In simple phrases, the law is a specific rule of behaviour which is sponsored with the aid of the sovereign energy of the country.

Sources of Law

A. Formal Sources: The legal power of the law can be found in the formal sources of law. Formal sources are the sources from which the law derives its force and validity. Of course, the only authority from which the law can spring and derive forces and validity is the state.

This source of law includes:-

- **Will of the State:** The State makes its own law for the benefit of its residents with due process of law enshrined in our esteemed constitution. In Indian scenario, the State can make laws on the subjects which are provided in the State list under **7th Schedule**. Hence State has the power to make laws and henceforth the laws made are categorized under formal sources of law.
- **Will of the people:** Sometimes laws are even made by the will of the people. When people face a certain problem in their day to day life they have the option to address those delinquent and if the State is satisfied with those problems and solutions stated then State makes it in a form of law. *For example, people are not allowed to use speakers or play loud music after 10 pm at night.*
- **Judicial decisions of the court:** Even judicial decisions delivered in various judgment is a source of law and falls under a formal source of law. The decisions given by our lordships are of immense value and treated as a form of law. There are numerous judgments after which it has been transformed into a law. The reports submitted by judges or by the committee's ad hoc or permanent is also converted into law if it suffices the purpose.

For example, **Visakha & others vs. State of Rajasthan:** A 1997 Indian supreme court case where Vishakha and different girls organizations filed Public interest Litigation (PIL) in opposition to the State of Rajasthan and Union of India to put into effect the essential rights of operating women underneath **Articles 14, 19 and 21 of the Constitution of India**. The petition turned into filed after Bhanwari Devi, a social worker in Rajasthan was brutally gang-raped for stopping a baby marriage.

The court decided that the consideration of “worldwide Conventions and norms are considerable for the purpose of interpretation of the assure of gender equality, right to paintings with human dignity in Articles 14, 15, 19(1)(g) and 21 of the charter and the safeguards in opposition to sexual harassment implicit therein.” The petition ended in what is popularly known as the Vishaka guidelines or law to be followed **for prevention of women from sexual harassment at the workplace.**

B. Informal/Material Sources: As the name suggests the material for the different law can be taken up from these sources. However, the validity of laws cannot be done from these sources. The material sources provide the matter. According to Salmond “the material source supplies the substance of the rule to which the formal source gives the force and nature”. Material source of law is the place where the law material is taken. Material source of law is a factor that helps the formation of the law.

For example,

- Social relations, political power relations, socio-economic situation, tradition or religious views.
- The results of scientific research, international development, and geographical circumstances.

Historical Sources

Historical resources are rules which are in the end was legal ideas. *These sources basically help us to know the historical significance and the need for such development of law.* Ancient India represented a distinct tradition of law and had a historically independent school of legal theory and practice. **The Arthashastra, dating from 400 BC and the Manusmriti, from 100 AD,** were influential treatises in India, texts that were considered authoritative legal guidance. Manu's central philosophy was tolerance and pluralism, and was cited across Southeast Asia ***Such source is first located in an Unauthoritative form.*** commonly, such principles are not allowed by means of the courts as a count number of proper. They perform indirectly and in a mediatory way. **They are sources but have no legal recognition.** They operate indirectly and mediate. Under this class come **juristic writings, foreign decisions** and numerous other things from which a judge derives help in shaping his judgment. They are of two types: –**Religion and morality**

Literary sources of law

Mean the original sources of law which come from authorities on law. A literary source being an original source, any commentary written on the original work cannot constitute a literary source of law.

Legal Sources

Legal sources are considered to be one of the most significant sources of law. Basically, legal sources are the sources by which legal rules are formed. Legal sources are considered to be one of the primary and important organs for the development of legal rules. Legal sources are considered to be an authentic source for the formation of law. Legal sources are the main gates which allow us to get into the real realm of law. Legal sources are even followed in the courts when some decision has to be pronounced.

These sources serve the basis for the formation of laws. They are:-

1. Legislations
2. Precedent
3. Customs
4. Treaties and Conventions

Legislations

It is considered to be one of the **primary sources of law.** Legislation has a very wide ambit and is used in providing various types of requirement such ***as to regulate, to authorize, to enable, to prescribe, to provide funds, to sanction, to grant, to declare or to restrict.*** ***A parliamentary legislature frames new laws, such as Acts of Parliament,*** and amends or repeals old laws. Most of the power of the legislature is restricted by the nations constitution. Although the legislation has the power to legislate the court has the power to interpret statutes, treaties and regulations.

'Legis' means regulation and 'latum' means making. allow us to understand how various jurists have defined regulation.

1. Salmond- ***"legislation is that source of law which is composed within the declaration of prison regulations by using an able authority."***

2. Horace gray- "*regulation way the formal utterance of the legislative organs of the society.*"
 3. John Austin- "*There may be no law without a legislative act.*"
- **Analytical Positivist faculty of notion**– this school believes that common regulation is a statute and legislation is the normal supply of regulation making. most people of exponents of this school do no longer approve that the courts also can formulate law. They do no longer admit the claim of customs and traditions as a supply of law. as a consequence, they regard most effective law because of the supply of law.
 - **Historic school of the idea**– This group of professors believe that legislation is the least creative of the assets of law. The Legislative purpose of any regulation is to provide better form and effectuate the customs and traditions which are spontaneously evolved with the aid of the people. for this reason, they do not regard regulation as a source of law.

Different Kinds of legislation

1. **Supreme legislation**– *An ultimate or an advanced law is that which proceeds from the sovereign strength of the nation.* It cannot be repealed, annulled or managed via another legislative authority.
2. **Subordinate legislation**– *it's far that which proceeds from any authority aside from the sovereign power and is dependent for its persistent existence and validity on some superior authority.*
3. **Delegated law**– that is a sort of subordinate law. it's miles that the principal feature of the government is to enforce the law. *In case of Delegated regulation, executive frames the provisions of law. this is also known as govt legislation.* The govt makes laws in the form of orders, by-laws and so forth.

Sub-Delegation of power to make laws is likewise a case in Indian legal system. In India, the power to make subordinate law is commonly derived from existing permitting acts. It's miles essential that the delegate on whom such power is conferred has to act within the limits of the permitting act.

the main cause of this kind of regulation is to supplant and no longer to supplement the law. Its predominant justification is that sometimes legislature does now not foresee the difficulties that would come after enacting a regulation. Therefore, Delegated legislation fills in the one's gaps that aren't seen at the same time a method of the allowing act. The delegated legislation offers flexibility to regulation and there is sufficient scope for adjustment inside the light of experiences received in the course of the running of regulation.

Precedent

Judicial precedent mandates that there be a hierarchy of courts to help take care of issues. Judicial precedent, in its outright meaning, makes a previous decision of one court be binding on a lower court. The concept of stare decisis plays a role here. In other words, if a higher court has decided on a case and another similar case comes up at a lower court, the lower court will treat the case alike and pass the judgment exactly as like done by the higher court. This is because the previous judge had set a precedent for the lower court and the lower court and the lower court is bound to follow the precedent as such, as long as the case can be treated on a similar platform like the one decided earlier by the higher court.

In **Indo-Swiss Time Ltd. v. Umroo AIR 1981 P&H 213** Full Bench, it was held that "where it is of matching authority, then the weight should be given on the basis of rational and logical reasoning and we should not bind ourselves to the mere fortuitous circumstances of time and death".

Union of India v. K.S. Subramaniam, AIR 1976 SC 2435 - This case held that when there is an inconsistency the decision between the benches of the same court, the decision of the larger bench should be followed. **A Key principle of Judicial Precedent**

- **Consistency**
- **Hierarchy**
- **Bound by its own decision**

Customary Law

Salmond said that 'custom is the embodiment of these concepts which have counseled themselves to the countrywide judgment of right and wrong as the ideas of justice and public utility'.

Keeton said that "normal legal guidelines are those regulations of human movement, established by usage and seemed as legally binding via the ones to whom the guidelines are relevant, which might be adopted by way of the courts and implemented as a supply of regulation because they may be typically followed by using the political society as an entire or by means of some part of it".

However, Austin said that custom isn't always a source of law.

Roscoe Pound said that customary regulation comprises:

1. **Law formulated via custom of famous motion.**
2. **Law formulated thru judicial choice.**
3. **Law formulated with the aid of doctrinal writings and clinical discussions of legal standards.**

Ingredients of Custom

1. *Antiquity*
2. *Continuous in nature.*
3. *Peaceful Enjoyment*
4. *Obligatory Force*
5. *Certainty*
6. *Consistency*
7. *Reasonableness*

Conventional Law- Treatises etc.

Treaties and conventions are the persuasive source of global law and are taken into consideration "difficult law."

Treaties can play the role of contracts between two or extra events, along with an extradition treaty or a defense.

Treaties also can be law to adjust a specific thing of international family members or form the constitutions of worldwide agencies. ***Whether or not or not all treaties can be regarded as resources of law, they're assets of obligation for the parties to them. Article 38(1)(a) of the ICJ, which uses the term "worldwide conventions",*** concentrates upon treaties as a source of contractual duty but additionally acknowledges the possibility of a state expressly accepting the obligations of a treaty to which it isn't always officially a party.

For a treaty-primarily based rule to be a supply of law, rather than surely a source of obligation, it should either be capable of affecting non-events or have effects for parties more significant than the ones specifically imposed by way of the treaty itself.

As a result, the processes or methods via treaties end up legally binding are formal source of law that is a procedure through a prison rule comes into lifestyles: it's far law growing

Q. What is meant by a judicial precedent? "Law is what judges shall decide" – Explain

Every developed legal system possesses a judicial organ. The main function of the judicial organ is to adjudicate the rights and obligations of the citizens. In the beginning, in this adjudication the courts are guided by customs and their own sense of justice. As society progresses, legislation becomes the main source of law and the judges decide cases according to it. Even at this stage the judges perform some creative function. In the cases of first impression, in the matters of interpretation, or in filling up any lacuna in the law made by legislation the judges, to some extent, depend on their sense of right and wrong and in doing so, they adapt the law to the changed conditions.

Authority of previously decided cases: In almost all legal systems, the judges take guidance from the previous decisions on the point, and rely upon them. But the authority of such decisions is not the same in all the legal systems. In most of the countries including India, acquire their knowledge of the law through decisions of higher tribunals than from anything else. Such decisions are compiled and published in reports. These reports are considered to be very valuable from the legal literature perspective. These decisions are very efficient in deciding cases of subsequent cases of similar nature. They are called judicial precedents or precedents.

Definition of precedent

In general English, the term precedent means, *'A previous instance or case which is, or may be taken as an example of rule for subsequent cases, or by which some similar act or circumstances may be supported or justified.'*

According to Gray, *'A precedent covers everything said or done, which furnishes a rule for subsequent practice.'*

According to Keeton, *'A judicial precedent is judicial decision to which authority has in some measure been attached.'*

According to Salmond, In loose sense it includes merely reported case law which may be cited & followed by courts. In strict sense, that case law which not only has a great binding authority but must also be followed.

According to Bentham precedents are 'Judge made Law.'

According to Austin precedents are 'Judiciary's Law.'

In general in the judicial field, it means the guidance or authority of past decisions for future cases. Only such decisions as lay down some new rule or principle are called judicial precedents. The application of such judicial decisions is governed by different principles in different legal systems. These principles are called 'Doctrine of

Precedent'. For this case to be held, first such precedents must be reported, maybe cited and may probably be followed by courts. Secondly, the precedent under certain circumstances must be followed.

Nature of precedents

They must be purely constitutive and not abrogative at all. This means that a judicial decision can make a law but cannot alter it.

Where there is a settled rule of law, It is the duty of the judges to follow the same.

They cannot substitute their opinions for the established rule of law.

The function is limited to supplying the vacancies of the legal systems, filling up with new law the gaps that exist.

Importance of precedents

In the Ancient Legal System: The importance of the decisions as a source of law was recognised even in very early times. In the past, there have been numerous instances of this. Sir Edward Coke, in the preface of the sixth part of his report, has been written that Moses was the first law reporter. 'In the case of the daughters of Zelophe had, narrated at the beginning of the twenty- seventh chapter of the book of numbers, the facts are stated with the great clearness and expressly as a precedent which ought to be followed.' Even in the Mahabharata, it has been stated that, 'The path is the right one which has been followed by virtuous men.' This may be interpreted as giving a theory of precedent. In ancient legal systems of Babylonia and China, the judicial decisions were considered to be a great authority, and later on, they were embodied in code law.

In the Modern Legal System: Among the modern legal systems, the Anglo – American law is judge made law. It is called 'Common Law'. It developed mainly through judicial decisions. Most of the branches of law, such as torts, have been created exclusively by judges. The Constitutional Law of England, especially the freedom of the citizens, developed through judicial decisions.

According to Tennyson, Where freedom slowly broadness down, from precedent to precedent.

Not only in the municipal law but in international law also, the precedents have their importance. The decisions of the International Court of Justice are an importance source of International law. These precedents have been recognised by the International Court of Justice by Article 38(2)(d) of the Statue of the International Court of Justice. Further, Article 59 of the same holds that the decisions of the court only have persuasive value for future cases and hence the International Court of Justice is not bound by its own decisions in deciding similar cases in future. It holds that the decision is only binding the parties to the case.

The above brief discussion indicates the role and importance of decisions on precedents in the development of law and their importance as a source of law at the municipal as well as the international level.

Types of precedents

Persuasive precedents: Persuasive precedent (also persuasive authority) is precedent or other legal writing that is related to the case at hand but is not a binding precedent on the court under common law legal systems such as English law. However, persuasive authority may guide the judge in making the decision in the instant case. Persuasive precedent may come from a number of sources such as lower courts, "horizontal" courts, foreign courts, statements

made in dicta, treatises or law reviews. In Civil law and pluralist systems, as under Scots law, precedent is not binding but case law is taken into account by the courts.

Lower Courts: A lower court's opinion may be considered as persuasive authority if the judge believes they have applied the correct legal principle and reasoning.

Higher Courts in other Circuits: A court may consider the ruling of a higher court that is not binding. For example, a district court in the United States First Circuit could consider a ruling made by the United States Court of Appeals for the Ninth Circuit as persuasive authority.

Horizontal Courts: Courts may consider rulings made in other courts that are of equivalent authority in the legal system. For example, an appellate court for one district could consider a ruling issued by an appeals court in another district.

Statements made in obiter dicta: Courts may consider obiter dicta in opinions of higher courts. Dicta of a higher court, though not binding, will often be persuasive to lower courts.

The obiter dicta is usually, as its translation "other things said", but due to the high number of judges and several personal decisions, it is often hard to distinguish from the ratio decidendi (reason for the decision).

For this reason, the obiter dicta may usually be taken into consideration.

A Dissenting judgement: A judgment heard by a tribunal, and one judge dissented from the decision. The judge in the next case can decide to follow the dissenting judge's obiter and rationale. The judge can only opt to overturn the holding of a court lower or equivalent in the hierarchy, however. A district court, for example, could not rely on a Supreme Court dissent as a rationale for ruling on the case at hand.

Treatises, Restatements, Law Review Articles: Courts may consider the writings of eminent legal scholars in treatises, restatements of the law, and law reviews. The extent to which judges find these types of writings will vary widely with elements such as the reputation of the author and the relevance of the argument

Courts in other countries: An English court might cite judgments from countries that share the English common law tradition. These include other commonwealth states (for example Canada, Australia, or New Zealand) and, to some extent, the United States.

It is controversial whether it is appropriate for a U.S. court to consider foreign law or precedents. The Supreme Court splits on this issue. In *Atkins v. Virginia*, for example, the majority cited the fact that the European Union forbid death penalty as part of their reasoning, while Chief Justice Rehnquist denounced the "Court's decision to place weight on foreign laws." The House of Representatives passed a nonbinding resolution criticizing the citing of foreign law and "reaffirming American independence."

Binding precedents: In law, a binding precedent (also mandatory precedent or binding authority) is a precedent which must be followed by all lower courts under common law legal systems. In English law it is usually created by the decision of a higher court, such as the Supreme Court of the United Kingdom, which took over the judicial functions of the House of Lords in 2009. In Civil law and pluralist systems, as under Scots law, precedent is not binding but case law is taken into account by the courts.

Binding precedent relies on the legal principle of *stare decisis*. A stare decisis means to stand by things decided. It ensures certainty and consistency in the application of law. Existing binding precedents from past cases are applied in principle to new situations by analogy.

There are three elements needed for a precedent to work. Firstly, the hierarchy of the courts needs to be accepted, and an efficient system of law reporting. 'A balance must be struck between the need on one side for the legal certainty resulting from the binding effect of previous decisions, and on the other side the avoidance of undue restriction on the proper development of the law

Stare Decisis: *Stare decisis* is the legal principle by which judges are obliged to respect the precedents established by prior decisions. The words originate from the phrasing of the principle in the Latin maxim *Stare decisis et non quieta movere*: "to stand by decisions and not disturb the undisturbed." In a legal context, this is understood to mean that courts should generally abide by precedents and not disturb settled matters.

This doctrine is basically a requirement that a Court must follow the rules established by a Court above it.

The doctrine that holdings have binding precedence value is not valid within most civil law jurisdictions as it is generally understood that this principle interferes with the right of judges to interpret law and the right of the legislature to make law. Most such systems, however, recognize the concept of *jurisprudence constante*, which argues that even though judges are independent, they should judge in a predictable and non-chaotic manner. Therefore, judges' right to interpret law does not preclude the adoption of a small number of selected binding case laws.

Authority of Precedents: The authority of a decision as a precedent lies in its Ratio Decidendi.

Ratio Decidendi and Obiter Dictum

There are cases which involve questions which admit of being answered on principles. Such principles are deduced by way of abstraction of the material facts of the case eliminating the immaterial elements. The principle that comes out as a result of such case is not applicable only to that case, but to cases also which are similar to the decided case in their essential features. This principle is called Ratio Decidendi. The issues which need determination of no general principles are answered on the circumstances of the particular case and lay down no principles of general application. These are called Obiter Dictum. It is the Ratio Decidendi of a case that is binding and not the Obiter Dictum that has a binding effect of a Precedent. But it is for the judge to determine the Ratio Decidendi of the decision and to apply it on the case which he is going to decide. This gives an opportunity to him to mould the law according to the changed conditions by laying emphasis on one or the other point.

Merits of the Doctrine of Precedents

It shows respect to one ancestors' opinion. Eminent jurists like Coke and Blackstone have supported the doctrine on this ground. They say that there are always some reasons behind these opinions, we may or may not understand them.

Precedents are based on customs, and therefore, they should be followed. Courts follow them because these judicial decisions are the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law.

As a matter of great convenience it is necessary that a question once decided should be settled and should not be subject to re-argument in every case in which it arises. It will save labour of the judges and the lawyers.

Precedents bring certainty in law. If the courts do not follow precedents and the judges start deciding and determining issues every time afresh without having regard to the previous decisions on the point, the law would become the most uncertain.

Precedents bring flexibility to law. Judges in giving their decisions are influenced by social, economic and many other values of their age. They mould and shape the law according to the changed conditions and thus bring flexibility to law.

Precedents are Judge made law. Therefore, they are more practical. They are based on cases. It is not like statute law which is based on a priori theory. The law develops through precedents according to actual cases.

Precedents bring scientific development to law. In a case Baron Parke observed 'It appears to me to be great importance to keep the principle of decision steadily in view, not merely for the determination of the particular case, but for the interest of law as a science.'

Precedents guide judges and consequently, they are prevented from committing errors which they would have committed in the absence of precedents. Following precedents judges are prevented from any prejudice and partially because precedents are binding on them. By deciding cases on established principles, the confidence of the people on the judiciary is strengthened.

As a matter of policy, decisions, once made on principal should not be departed from in ordinary course.

Demerits of the Doctrine of Precedents

There is always a possibility of overlooking authorities. The vastly increasing number of the cases has an overwhelming effect on the judge and the lawyer. It is very difficult to trace out all the relevant authorities on the very point.

Sometimes, the conflicting decisions of superior tribunal throw the judge of a lower court on the horns of a dilemma. The courts faced with what an English judge called "complete fog of authorities."

A great demerit of the doctrine of precedent is that the development of the law depends on the incidents of litigation. Sometimes, most important points may remain unjudicated because nobody brought action upon them.

A very grave demerit or rather an anomaly of the doctrine of precedent is that, sometimes it is extremely erroneous decision is established as law due to not being brought before a superior court.

Factors undermining the authority of a precedent

1. Abrogated decisions – A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher court.
2. Same decision on appeal is reversed by the appellate court. – 24th amendment of Indian Constitution was passed to nullify the decision of the SC in the case of Golaknath.
3. Affirmation and Reversal on a Different Ground – A decision is affirmed or reversed on appeal on a different point.
4. Ignorance of Statute – A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute i.e. delegated legislation. A court may know of existence of the statute or rule and yet not appreciate in the matter in hand. Such a mistake also vitiates the decision. Even a lower court can refuse to follow a precedent on this ground.

5. Inconsistency with Earlier Decision of Higher Court – A precedent is not binding if the court that decided it overlooked an inconsistent decision of a high court. High courts cannot ignore decision of Supreme Court of India.
6. Inconsistency with Earlier Decision of Same Rank – A court is not bound by its own previous decisions that are in conflict with one another. The court of appeal and other courts are free to choose between conflicting decisions, even though this might amount to preferring an earlier decision to a later decision.
7. Precedent *sub silentio* or not fully argued – When a point is not involved in a decision is not taken notice of and is not argued by a counsel, the court may decide in favour of one party, whereas if all the points had been put forth, the decision in favour of one party. Hence, such a rule is not an authority on the point which had not been argued and this point is said to pass *sub silentio*. Binding force of a precedent does

not depend on whether a particular argument was considered therein or not, provided the point with reference to which an argument was subsequently advanced was actually decided by the SC.

Circumstances which increase the authority of a precedent

1. The number of judges constituting the bench and their eminence is a very important factor in increasing the authority of precedent.
2. A unanimous decision carries more weight.
3. Affirmation, approval or following by other courts, especially by a higher tribunal, adds to the strength of a precedent.
4. If an Act is passed embodying the law in a precedent, the gains an added authority.

Q. What is meant by 'Ratio Decidendi' of a decision? How to find the 'Ratio Decidendi' of a case?

When we say that a judicial decision is binding as a precedent, what we really mean is that a rule or principle formulated and applied in that decision must be applied when similar facts arise in future. This rule or principle is the ratio decidendi which is at the centre of the doctrine of precedent. The expression ratio decidendi has different meanings. The first meaning which is the literal translation of the expression is 'the reason for deciding'. Ratio decidendi is as 'the rule of law proffered by the judge as the basis of his decisions.

According to Salmond: A precedent is a judicial decision which contains in its a principle. The underlying principle which thus form its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it but it is the abstract ratio decidendi which alone has the force of law as regard the world at large.

It is a legal phrase which refers to the legal, moral, political, and social principles used by a court to compose the rationale of a particular judgment. Unlike obiter dicta, the ratio decidendi is, as a general rule, binding on courts of lower and later jurisdiction—through the doctrine of stare decisis. Certain courts are able to overrule decisions of a court of coordinate jurisdiction—however, out of interests of judicial comity, they generally try to follow coordinate rationes.

The process of determining the ratio decidendi is a correctly thought analysis of what the court actually decided—essentially, based on the legal points about which the parties in the case actually fought. All other statements about the law in the text of a court opinion—all pronouncements that do not form a part of the court’s rulings on the issues actually decided in that particular case (whether they are correct statements of law or not)—are obiter dicta and are not rules for which that particular case stands. Ratio Decidendi is the binding part for the case at hand. Goodheart-He does not accept the classical view that ratio is the principle of law which links the essential determination of the case with the essential or material facts of it and the statement of the judge may or may not do that or may be formed too widely or too narrowly. It is the general ground upon which the decision is based- Supreme Court of India. How to ascertain Ratio Decidendi Krishna Kumar v. Union of India- AIR 1990 SC 1782 The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law either statutory or judgment and minor premise consisting of the material facts of the case under immediate consideration. Therefore, we find that it is the ratio decidendi which is a binding precedent. Other material part is the Obiter Dictum.

Process of Reasoning– 1.

Major Premise

2. Minor Premise

In **Union of India v. Maniklal Banerjee** Only ratio decidendi is binding and has precedent value.

State of Orissa v. Sudhanshu Shekhar Mishra— A decision is an authority for what it decides and not for what can logically be deduced from it. The only thing in a judge’s decision binding a party is the principle upon which the case is decided. On our analysis, we have to isolate the ratio of the case. A decision contains:

1. Finding of Material Facts- Direct and inferential
2. Statement of the principle of law applicable to the legal problem disclosed by the facts.
- Judgments based on the combined effects of the above two.

Ratio Decidendi is a statement of law applied to the legal problems raised by the facts as found upon which the decision is based. **Dalveer Singh v. State of Punjab** Though we are able to find out the ingredients from the decision. But later on, when there is a similar situation, it is very difficult for him to apply the ratio in that case because a rigorous division of facts has to be made which is not possible. It is correct that a decision on a question of sentence depending upon the facts and circumstances of a case can never be regarded as a binding precedent, much less ‘law’ declared under article 141 of Constitution of India so as to bind all law courts within the territory of India.

Minerva Mills v. Union of India “If a provision is upheld by the majority, the fact that the reasoning of some of the judges is different from the ratio of that case will not affect its validity”.

Q. Discuss Obiter Dicta.

The judge may go on to speculate about what his decision would or might have been if the facts of the case had been different. This is an obiter dictum.

The binding part of a judicial decision is the ratio decidendi. An obiter dictum is not binding in later cases because it was not strictly relevant to the matter in issue in the original case. However, an obiter dictum may be of persuasive (as opposed to binding) authority in later cases.

A difficulty arises in that, although the judge will give reasons for his decision, he will not always say what the ratio decidendi is, and it is then up to a later judge to “elicit” the ratio of the case. There may, however, be disagreement over what the ratio is and there may be more than one ratio.

In a judgement delivered by a court, what part is a binding precedent is relevant so as to be precise as to what is ultimately binding proposition to other courts. What the court decides generally is ratio decidendi or rule of law which it is authority. As against persons not parties to suit or proceeding general rule of law i.e ratio decidendi is binding. The rule of law or ratio decidendi is that what is applied and acted upon by the Court. The rules of law or ratio decidendi are developed by courts and are thus creatures of courts. The ratio has to be developed by judges while deciding cases before them. Statement made by judges when giving lectures are statements made in extra judicial capacities and are therefore not binding. In the course of judgement a judge may make observations not precisely relevant to decide the issue. These observations are obiter dicta and are having no binding authority but are none the less important. These obiter dicta are helpful to rationalize law only to suggest solutions to problems not yet decided by the Court. Any ratio decidendi are amenable to distinction on different facts and thus where the meaning thereof are widened, restricted, distinguished or explained, the latest interpretation of ratio decidendi in later cases becomes authority to these state of facts and in that sense. The rule of law based on hypothetical facts is mere obiter dicta and thus not binding.

Not infrequently it is difficult to find out what is the ratio decidendi in the judgement when several propositions are considered by the Court. In short ratio is general rule without which the case would have been decided otherwise.

The application of the same law to the differing circumstances and facts of various cases which have come up to this Court could create the impression sometimes that there is some conflict between different decisions of this Court. Even where there appears to be some conflict, it would, we think, vanish when the ratio decidendi of each case is correctly understood. It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.

***The Regional Manager and another v. Pawan Kumar Dubey*, AIR 1976 SC 1766;; 1976(3) SCC 334.** The general observations therein should be confined to the facts of those cases. Any general observation cannot apply in interpreting the provisions of an Act unless the Court has applied its mind to and analysed the provisions of that particular Act.

Q. Explain the nature of legislation as a primary source of law throwing light on the advantages of it over Precedents.

“Legis” means law and “latum” means making. Legislation means lawmaking. It also refers to the law made by the legislature. It may also be defined as the promulgation of legal rules by an authority which has the power to do so. It is the formal declaration of the legal rules by the legislative organ of the body politic.

In a wider sense, it includes all the sources of law, any act done with the effect of adding to or altering the law. When a judge establishes a new principle in a judicial decision, it is possible to say that he has exercised legislative power and it is also legislation. It frames new laws, amends the old laws and cancels existing laws in all countries.

According to Salmond: *'Legislation is that source of law which consists in the declaration of legal rules by a competent authority.'*

According to Austin: *'There can be no law without a legislative act.'*

According to Gray: *'Legislation means the formal utterance of the legislative organs of the society.'*

Analytical Positivist– A typical law is a statute and legislation is the normal source of lawmaking. The majority of exponents of this school do not approve that the courts also can formulate law. They do not admit the claim of custom as a source of law. Thus, they regard only legislation as the source of law.

Historical School of Thought– Legislation is the least creative of the sources of law. The legislative purpose of the legislation is to give better form and more effective the custom which is spontaneously developed by the people. They do not regard legislation as a source of law.

The legislation is generally used in a more limited sense.

It denotes the laying down of legal rules by a sovereign and subordinate legislature. An important distinction between lawmaking by legislature and lawmaking by a court must be clearly understood. When the legislature makes a law, it does not have any actual disputes before it and it lays down general rules for the future, without reference to any actual dispute.

Courts, on the other hand, are engaged in the settlement of disputes and any law making that they may do is only with reference to actual disputes before them and only in so far as is necessary for their solution. Thus we may say that judicial lawmaking is incidental to the solving of legal disputes; while lawmaking is the main function of the legislature.

A legislation is most accurately termed as the enacted law, all other forms being distinguished as un-enacted. However, in a jurisprudential sense, Legislation includes only an expression of the will of the legislature directed to the making of the rules of law.

Legislation or "Statutory law" is a law or the process of making a law which is "enacted" by a legislature while the legislature is the body or chamber of people who make, amend or repeal laws. An item or piece of legislation is known as a bill before it becomes a law. The "paramount consideration" in enacting laws in a 'Welfare State' should be "the best interests of the people, particularly women and children, in which a standard is echoed throughout the legal instruments on women and children's rights, Scheduled Castes, Scheduled Tribes and other backward classes.

Purpose of Legislation

Legislation can have many purposes, for example, to regulate, to authorize, to prescribe, to provide, to sanction, to grant, to declare or to restrict and repeal.

Classification

Legislation may be broadly classified as Supreme, subordinate legislation. It is Supreme when the sovereign authority itself make the law, as the law made by Indian Parliament. It is subordinate when the sovereign power is delegated to any other authority to make law, as the power delegated to a corporation to make law.

Supreme Legislation: The Supreme legislation is by the sovereign power of the state. Therefore, any other authority within the state can, in no way, control or check it. It is considered not only supreme but legally omnipotent. A classical exposition of this principle can be found in Dicey's book, 'The Law of the Constitution'. There is no legal limitation on its power. Indian parliament is also supreme. Though there are certain constitutional restrictions upon its power, it is not subject to any other legislative authority within the state. It cannot be repealed, annulled or controlled by any other legislative authority.

Subordinate Legislation: Subordinate legislation is legislation by any other authority than the Supreme authority in the state. It is made under the powers delegated by the Supreme authority. Such legislation owes its existence, validity, and continuance to the Supreme authority. It can be repealed by and must give way to sovereign legislation. Subordinate legislation is subject to parliamentary control. Five different forms of subordinate legislation can be identified. These are:

Colonial Legislation: The countries which are not independent, and are under the control of some other state have no Supreme power to make law. Such countries are of various classes: as colonies, dominions, protected or trust territories etc. The laws made by them are subject to the Supreme legislation of the state under whose control they are. Thus it is subordinate legislation. Britain has had many colonies and dominions. The laws made by them for the self-government are subject to alteration, repeal or supersession by the legislation of the British Parliament. As the colonies are fast achieving independence, and almost all the British dominions have uncontrolled power for legislation, therefore in the near future, we may not have this class of subordinate legislation.

Executive Legislation: When legislative powers are delegated to the executive, it is called executive legislation. Though the important function of the executive is to implement the laws and carry on the administration, it is always entrusted with some subordinate legislation powers also. Today, practically every law enacted by the legislature contains delegation clauses conferring law-making powers on the executive to supplement the statutory provisions.

Judicial Legislation: Powers are given to the judicature to make rules for the regulation of its procedure. In India, the Supreme Court and the high court both have the power to make rules for their respective procedure and administration.

Municipal Legislation: Municipal bodies are given powers to make bye-laws concerning their local matters. Byelaw made by a local body operates within its respective locality. In India, such municipal bodies are Municipal corporations, Municipal Boards, Zila Parishads, etc. There is a move for granting very wide powers to Panchayats. Thus, there is a possibility of expansion of this kind of subordinate legislation in our country.

Autonomous Legislation: When the Supreme authority confers powers upon a group of individuals to legislate on the matters entrusted to them as a group, the law made by the latter is called the autonomic law and the body is known as an autonomous body. A railway is an autonomous body. It makes bye-laws for the regulation of its administration, etc. A university is also an autonomous body.

Delegated Legislation: Delegated legislation is a kind of subordinate legislation. Generally the 'delegation legislation' means the law made by the executive under the powers delegated to it by the Supreme legislative authority. It comes

in the form of orders, by-laws etc. The Committee on Minister's power said that the term delegated legislation has two meanings-

1. Firstly, it means the exercise of power that is delegated to the executive to make rules.
2. Secondly, it means the output the output or the rules or regulations etc. made under the power so given.

Sub-Delegation is also a case in Indian Legal system. The power to make subordinate legislation is derived from existing enabling act. It is fundamental that the delegate on whom such power is conferred has to act within the limits of the enabling act. Its purpose is to supplant and not to supplement the law. Its main justification is that sometimes legislature does not foresee the difficulties that will come while enacting the law.

Therefore, Delegated Legislation fills in those gaps which are not seen while the formulation of the enabling act. Delegated Legislation gives flexibility to law and there is ample scope for adjustment in the light of experiences gained during the working of legislation.

Comparison between Legislation and Precedent

1. In precedent, rules and principles are laid down by inductive method. In legislation, the deductive method is resorted to. The courts take the rules from the statute and apply it to particular cases.
2. Legislation has abrogative power also. It not only created law but it can abrogate an existing law, existing in whatever form- statute, precedent or custom. Precedent is only constitutive. A judge is bound by the precedent of the higher courts and the enacted law. If a precedent checks the operation of a rule it is only on the ground that it is not law. But, when a rule is established as law, a precedent cannot abrogate it. Thus, precedents can work successfully only for any legal growth and not for any legal reform which can be done only by legislation.
3. Statute law is definite, brief, clear and easily understandable. Therefore, in the form it is superior to precedent, to know principles and rules one will have to look into the details of the case. Salmond puts the same thing in the form of an allegory: 'Case law is gold in the mine-a few grains of the precious metals to the tons of useless matter – while statute law is the coin of the realm ready for immediate use.'
4. A legislation is general and comprehensive. A precedent has none of those merits.
5. A statute can make rules for the future cases which may arise, in other words, a statute can be laid down law beforehand. A Precedent can lay down a rule when a case comes before it. Thus, its emergence depends on litigation.
6. The very aim of the legislation is to make law. The main purpose of the precedent is to interpret and to apply the law.
7. For the most part, the operation of legislation is perspective though it may be retrospective also if it so chooses. In certain countries, in some branches of law, there can be no retrospective legislation. A precedent makes law in the very act of enforcing and applying it. Thus, its operation is mostly of a retrospective nature. The rules laid down in the decision operate from the date of the transaction which is the subject-matter of the dispute. An interpretation gives to a statute operates from the date of the passing of the statute unless there is some interposing contrary decision.

Superiority between Legislation and Precedent

It depends on the definitions of law: Whether precedent is superior to legislation or legislation is superior to precedent is a controversial question. It more or less depends on as to how one defines law- whether he puts the legislature or the courts in the center of the legal system.

Analytical Jurists: Jurists **Austin** and **Bentham** contend that legislation is always superior to precedent. A statute is made after due deliberation and not in the haste in which a judge disposes of his cases. Other grounds have also been given in support of the superiority of statute. It is certain, clear, comprehensive, and easily accessible. It passes through the scrutiny of the great number of men before it becomes law. The case law is the result of the whim of certain individuals. A planned progress of society is possible only through statute law.

Other views by Salmond and Grey: The supporters of case law have also presented weighty grounds in support of their contention. They say that it causes an organic development of law, and can easily adapt the law to the changing conditions. The matters which receive so much calm and patient consideration in court cannot receive the same by busy legislators. Case law is more practical because it is laid down after a careful study of facts and the various circumstances whereas the statute law is of an abstract and rigid nature.

Salmond, a great supporter of case law says: “**case law, with all its imperfections, has at least this merit that it remains in leaving contact with the reason and justice of the matters and draws from this source a flexibility and power of growth and adaptation which are too much wanting in the *litera scripta* of enacted law.**”

Grey supports the same view still more forcefully. According to him, case law is not only superior to statute law but all the law is judge-made law. The shape in which a statute is imposed on the community as a guide for conduct is that statute as interpreted by the courts. **The courts put life into the dead words of the statute.**

Legislation and Jurist law: Legislation is, sometimes, compared with the jurist law, or the legal principle enunciated in juristic writings, there are a number of points of distinction between the two: firstly, the legal principle laid down in jurisdiction writings are of a very general and abstract nature while in the statute they are concrete, precise and specific. Secondly, the statute law possesses a positive sanction from the sovereign authority of the state whereas there is no sanction behind the jurist law.

However, there is a close relationship between the two, and the statute law is greatly helped by the jurist law. Sometimes, the latter ushers the formers and the legal principles enunciated by jurists are embodied in the statute law.

Conclusion: The supporters of both the views have made exaggeration. As observed earlier, it is due to their differences in the definition of law. They have spoken of the superiority of one or the other on that basis. In the present age, both are equally important and one cannot attain its end without the other. The aim of the law is the protection and progress of the society and the individual. For a planned progress, legislation is very necessary, thus they both contribute equally to the development of law.

Q. When does a custom become law? How far customs can be used as a source of law?

Definition of Custom —In the ordinary language custom is a ha-bitual course of conduct observed uniformly and voluntarily by the people concerned. In the legal language the different jurists have defined custom as! under —

1. **According to Austin**, “Custom is a rule of conduct which the governed observed spontaneously and not in pursuance of a law set by a political superior.”
2. **According to Salmond**, “Custom is the embodiment of those principles which have commended themselves to the national conscience as principles of justice and public utility.”
3. **According to Holland**, “Custom is a generally observed course of conduct.” He says that the mode in which a path is formed across any grass field best illustrates the formation of such habitual course of conduct.
4. **According to Judicial Committee**, “Custom is a rule which in a particular family or in a particular district has from long usage obtained the force of law.”

Essentials of a Custom —According to Blackstone, a custom to be recognised as law must satisfy the following essentials —

1. **Antiquity**—A custom to be recognised as law must be proved to be in existence from time immemorial, time whereof the memory of man runneth not to the contrary. This is the rule of the English law. There, this legal memory presumed to be going back to a fixed time. An arbitrary time limit, that is, the year 1189, the first year of the reign of Richard, has been fixed at which the custom must be proved to be existence. By a fiction of law, human memory is made to extend for about 800 years. But the presumption of law is that the customs which are old and whose time of origin cannot be ascertained must have started before the year 1189. However, if it could be shown that a custom came into existence at any time later than 1189 the presumption to antiquity shall be defeated.

Indian Rule —According to Manu, the great Hindu Jurist, “Immemorial custom is transcendental law.” The law in India, at present is that antiquity is essential for the recognition of a custom, but there is no such fixed period for which it must have been in existence as it is in the English Law.

2. **Continuity**—A custom must have been practised continuously. In England, the custom during the period from 1189 must have been enjoyed continuously without any interruption. If a custom has been disturbed for a considerable time, a presumption arises against it. However, Blackstone has drawn a distinction between the interruption of the ‘right’ and the interruption of the mere ‘possession’. It is the discontinuance of the ‘right’, for howsoever small a time, that ends the custom. It means that if possession for some time is disturbed, but the claim to enjoy the custom is not abandoned, the custom continues.

3. **Peaceable Enjoyment** —The third essential of a valid custom is that it must have been enjoyed peaceably. If a custom is in dispute for a long time in a law court, or otherwise, it negatives the presumption that it originated by consent as most of the customs naturally might have originated.

4. **Obligatory Force** —A custom, to be valid, must have an obligatory force. It must have been supported by the general public opinion and enjoyed as a matter of right. If practice was maintained by stealth or by something of that sort, it cannot become a custom.

5. **Certainty**—A custom, to be valid, must be certain. A custom which is vague or indefinite cannot be recognised. It is more a rule of evidence than anything else. The court must be satisfied by a dear proof that custom exists as a matter of fact, or as a legal presumption of fact.

6. **Consistency**—Custom, to be valid, must not come into conflict with other established customs. There must be consistency among the customs. It is, therefore, that one custom cannot be set in opposition to the other custom.

7. Reasonableness —A custom, to be valid, must be reasonable. Prof. Allen says that the rule regarding reasonableness is 'not that a custom will be admitted, if reasonable, but that it will be admitted unless it is unreasonable.' The courts are not 'at liberty to disregard a custom when-ever they are not satisfied as to its absolute rectitude and wisdom, or whenever they think that a better rule could be formulated in the exercise of their own judgement otherwise a custom will lose much of its force and sanctity.' For declaring a custom inapplicable on the ground of unreasonableness it will have to be shown that it is obviously opposed to reason and right.

8. Conformity with the Statute Law—A custom, to be valid, must be in conformity with statute law. It is a positive rule in most of the legal systems that a statute can abrogate a custom. Although according to the Historical school, a custom is superior to statute and it can supersede a statute, this view has nowhere been recognised in practice. The English rule is that a custom will not be recognised if it is in conflict with some fundamental principle of the common law.

In case all the above mentioned essentials of a custom are proved, it is law, but the courts have power on sufficient grounds to change the law it embodies.

Q. What are the nature, function and purposes of Law?

Law is the subject-matter of jurisprudence since the latter deals with the study of law. In its most general and comprehensive sense, it means any rule of action and includes any standards or pattern to which actions are or ought to be confirmed.

Blackstone defines law as "it signifies a rule of action and is applied indiscriminately to all kinds of action whether animate or inanimate or rational or irrational. Bentham said that law is a portion of discourse by which expression is given to an extensively applying and permanently in during act or state of the will of a person or person in relation to others and in relation to whom he is or they are in the state of superiority. Salmond defines law as the body of principles recognised and applied by the sovereign in the administration of Justice. According to Austin law is a command of the sovereign backed by sanction.

All definitions have been founded on different bases which can mainly be categorised into the following three categories :

1. Law is a dictate of reason – given by supporters of the natural theory of law.
2. Law is a command of the sovereign – supported by followers of analytical School of Law.
3. Law is the practice of court – supported by followers of legal realism.

The word law is in two main forms that is one is concrete and the other is abstract. In its concrete form, the law includes statutes, ordinances, decrees and the act of Legislature.

Law may be described as a normative science that is a science which Lays down norms and Standards for human behaviour in a specified situation or situation enforceable through the sanction of the state.

What distinguishes law from other Social Sciences is its normative character. This fact along with the fact that at stability and certainty of law are desirable goals and social values to be pursued , make the law to be a primary concern for the legal fraternity.

Theoretically speaking judges do not make law they only interpret or declared it but the truth is that even during the period when analytical positivism held its over the common law judges through their judicial creatively developed the common law to suit the needs of the social change.

The function of law is that of social engineering and this perception has been accepted by all the civilized countries of the world including India. The concern of law as an instrument of enhancing economic and Social Justice has widened to an extent that there has been a growth of a variety of laws touching various facets of human life.

Law, is considered not as an end in itself, but is a means to an end. The end is securing of social justice. Almost all theorists agree that law is an instrument of securing justice.

According to Holland, the function of law is to ensure the well-being of the society. Thus it is for the protection of individuals' rights.

Roscoe Pound attributed four major functions of law, namely: (1) maintenance of law and order in society; (2) to maintain status quo in society; (3) to ensure maximum freedom of individuals; and (4) to satisfy the basic needs of the people. He treats law as a species of social engineering.

Though law functions to regulate the conduct of men in society, it's extent of operation has to be restricted to some extent for ensuring certainty and stability in the legal system. Having regard to history of development of law, it would be seen that different approaches through doctrinal theories propagated by jurists from time to time has been to project law as an instrument for balancing the rights and duties of the Subjects to exert social control.

FUNCTION OF LAW

Salmond's opinion regarding the function of law appears to be sound and logical.

The term "Law" denotes different kinds of rules and Principles. Law is an instrument which regulates human conduct/behavior. Law means Justice, Morality, Reason, Order, and Righteous from the view point of the society. Law means Statutes, Acts, Rules, Regulations, Orders, and Ordinances from point of view of the legislature. Law means Rules of court, Decrees, Judgment, Orders of courts, and Injunctions from the point of view of Judges. Therefore, Law is a broader term which includes Acts, Statutes, Rules, Regulations, Orders, Ordinances, Justice, Morality, Reason, Righteous, Rules of court, Decrees, Judgment, Orders of courts, Injunctions, Tort, Jurisprudence, Legal theory, etc.

Ever since the dawn of Human civilization, mankind has had some sort of rule or that they used to Govern itself in society laws set the standard in which we should live in if we want to be part of society. Law set up rules and regulations for society so that we can freedom, gives Justice to those who were wronged, and it set up that it protects us from our own Government. Most importantly the law also provides a mechanism to resolve disputes arising from those duties and rights and allows parties to enforce promises in a court of law (Corley and Reed 1986 P.A) According to Corley and Reed (1986) law is a body of rules of action or conduct Prescribed by controlling authority, and having legal binding forces. Laws are created because it helps prevent chaos from happening within the business environment and as well as society. In business, the law sets guide lines regarding employment regulatory, compliance, even inter office regulations.

The Modern History of Common Law: With the decline in the power of the monarchy and the ascendancy of parliament, the English court system stabilized; judicial independence was taken for granted and no longer considered a problem by the English rulers. Even Oliver Cromwell and his puritan followers, who overthrew the Stuart kings and established a commonwealth in England between 1648 and 1660, feared the possible destabilizing effects

of sweeping changes in the law. Cromwell thus made no major effort to supersede the common law (Prall, 1966). The English legal system remained a complex system of rules and precedents, interpreted with small shades of meaning and requiring a body of legal experts to deal with it. These legal experts had to save long apprenticeships to become familiar with the vast number of cases and precedents that would govern their decisions.

DIVINE LAWS AND HUMAN LAWS: Divine Laws are the laws of God himself and are beyond the scope of jurisprudence, whereas, human laws are framed by men.

PUBLIC LAW AND PRIVATE LAW: The term public implies either State, or sovereign part of it. By private, it means an individual or a group of individuals. In private law, State exists but only as an arbiter of rights which exist between individuals. In public law, State itself is a party involved along with the public at large..

Salmond's classification of Law

He has referred to eight kind of laws

1. Imperative law – the command of the sovereign must be general and the observance of law must be enforced by some authority.
2. Physical or scientific law – these are laws of science which are the expression of the uniformities of nature.
3. Natural or moral law – Natural law is based on the principles of right and wrong whereas Moral laws are laws based on the principles of morality.
4. Conventional law – system of rules agreed upon by persons for the regulation of their conduct towards each other.
5. Customary law – any system of rules which are observed by men as a custom and has been in practice since time immemorial.
6. Practical or technical law – rules meant for a particular sphere by human activity.
7. International law – rules which regulate the relations between various nations of the world.
8. Civil law – the law enforced by the State.

AUSTIN'S CLASSIFICATION OF LAWS:

1. Divine law – the law of God, beyond the scope of jurisprudence.
2. Human Law – Law made by men.
3. Positive morality – rules set by the non-political superior.
4. Law metaphorically or figuratively so-called.

However, according to him, only divine law and human law are proper laws.

PURPOSE OF LAW

Salmond retains the emphasis on the judicial process but considers that a reference to the purpose of the law is essential. The law may be defined as the body of principles recognised and applied by the state in the administration of Justice. Justice is the end of law and it is only fitting that an instrument should be defined by a delineation of the purpose which is its *raison d'être*. This raises the question of the relationship of law and Justice in which one theory defines law in terms of justice but from this, it follows that and unjust law cannot exist for if it could then on the promises there would be a fatal contradiction.

Many writers have fallen into the simple trap. Earlier theories of natural law put the emphasis on Justice and denied the validity of law if it was opposed to natural justice but slavery condemned by natural law yet existed in the legal systems of the time and thought the Romans recognise this difficulty they never succeeded in solving it. A second means of solving the problem of the relationship of law and justice is to place all the emphasis on law and regard justice as near conformity to law by then we are depriving ourselves of a Criterion which may not be wholly subjective by which we made test the operation of a legal system. The purpose of law is essential to an understanding of its real nature but the pursuit of justice is not the only purpose of law the law of any period so many ants and doors and will vary as the decades roll by and to seek a for one term which may be placed in a definition as the only purpose of law leads to dogmatism the end That seems most nearly Universal is that of securing order but this alone is not an adequate description indeed, Kelson regards it as a pleonasm since law itself is the order of which we speak.

Q. What is legal right? Do you think 'Right is a Creation of law'? What are the main elements of a right?

The development of society is credited to the constant evolution of law. When people come into contact with each other, everyone has certain rights and duties obligated towards one another. A right and duty are the pillars of law, and are hence consequently protected by it. Both these concepts are intertwined. The concepts of legal rights and duties in Jurisprudence are elucidated below.

DEFINITION OF RIGHT

The definition of legal rights have been propounded by several famous legal philosophers. Some definitions are as follows –

1. **John Austin** – According to Austin, “A party has a right when another or others are bound or obliged by law to do or forbear towards or in regard of him”. This definition was not widely accepted. It was stated by John Stuart Mill that the act referred by Austin should be in the interest of the person who can be said to have the right. He illustrated with an example by stating that when a prisoner is sentenced to death, the jailer is bound to execute him. Does this mean that the convict has the right to be hanged?
2. **Rudolf Von Jhering** – Jhering defined rights as “legally protected interests”. The law does not protect all such interests. The interests of men conflict with one another and the law, is the rule of justice and protects only certain interests.
3. **John Salmond** – Salmond defines right as an interest recognised and protected by a rule or justice. He says, for an interest to be regarded as a legal right, it should obtain not merely legal protection but also recognition. The law protects cruelty against animals, and to some interest the interest of animals, but animals do not possess any legal rights.

4. **Holland** – Legal rights were defined by Holland as the “capacity residing in one man of controlling, with the assent and assistance of the state the actions of others.” He followed Austin’s definition
5. **Gray** – He defined a legal right as “that power which a man has to make a person or persons do or refrain from doing a certain act or certain acts, so far as the power arises from society imposing a legal duty upon a person or persons.” He states that the “right is not the interest itself, it is the means to enjoy the interest secured.”
6. **Supreme Court of India** – The Apex Court of India defined legal right in the case of **State of Rajasthan v. Union of India [AIR (1977) SC 1361]** as: “In strict sense, legal rights are correlatives of legal duties and are defined as interests whom the law protects by imposing corresponding duties on others. but in a generic sense, the word ‘right’ is used to mean an immunity from the legal power of another, immunity is exemption from the power of another in the same way as liberty is exemption from the right of another, Immunity, in short, is no subjection.”

THEORIES OF LEGAL RIGHTS

There exist two main theories of legal rights – 1. The Will Theory and 2. The Interest Theory.

The Will Theory of Legal Rights – The Will Theory states that right is an inherent attribute of the human will. It says that the purpose of the law is to allow the free expression of human will. This theory was advocated by scholars like Hegel, Kant, Hume and so on. The subject matter is derived from human will. Austin, Holland and Pollock define rights in terms of will. According to the famed French Jurist, John Locke “the basis of the right is the will of the individual.” Puchta defined the legal right a power over an object which by means of right can be subjected to the will of the person enjoying the right. This theory has been widely accepted by the jurists in Germany.

Despite its wide acceptance, there were many scholars who disagreed with it. Some of the criticisms were from Duguit who is opposed to the “will” theory. According to him the basis of law is the objective fact of “social solidarity” and not the subjective will. The law is to protect only those acts or rights which further “social solidarity”. He calls the theory of subjective right a mere metaphysical abstraction.

The Interest Theory of Legal Rights - The Interest Theory was proposed by the German Jurist, Rudolf von Jhering. Jhering defined rights as legally protected interest. Jhering does not emphasize on the element of will in a legal right. He asserts that the basis of legal right is “interest” and “not will”. The main object of law is protection of human interests and to avert conflict between their individual interest. These interests are not created by the state, but they exist in

the life of the community itself. Salmond supported it but mentioned that enforceability is also an essential element. He says, “Rights are concerned with interest, and indeed have been defined as interests protected by rules of right, that is by moral or legal rights.”

Salmond has criticized Jhering’s theory on the ground that it is incomplete since it completely overlooks the element of recognition by the state. A legal right should not only be protected by the state but should also be legally recognized by it. Gray stated that the theory was only partially correct. He emphasized that a legal right is not an interest in itself but it is only a means to extend protection to interests. He considers legal right as that power by which a man makes other persons do or refrain from doing a certain act by imposing a legal duty upon them through the agency of law “state”.

Both these theories are not opposed to each other, it is rather a combination of both that is correct. Dr. Allen has tried to blend these two theories by pointing out that the essence of legal right seems to be, not legally guaranteed power by itself nor legally protected interest by itself, but the legally guaranteed power to realise an interest. Thus, it would be sensible to say that both “will” and “interest” are essential ingredients of a legal right.

ELEMENTS OF A LEGAL RIGHT

According to Sir John Salmond, each legal right has 5 essential elements –

1. **The Person of Inherence** – It is also known as the subject of right. A legal right is always vested in a person who may be distinguished, as the owner of the right, the subject of it or the “person of inherence”. Thus, there cannot be a legal right without a subject or a person who owns it. The subject means the person in whom the right is vested or the holder of the right. There can be no right without a subject. A right without a subject or a person who owns it is inconceivable. The owner of the right, however, need not be certain or determinate. A right can be owned by the society, at large, is indeterminate.
2. **The Person of Incidence** – A legal right operates against a person who is under the obligation to obey or respect that right. He is the “person of incidence”. He is a person bound by the duty or the subject of the duty.
3. **Contents of the Right** – The act or omission which is obligatory on the person bound in favour of the person entitled. This is called the context or substance of right. It obliges a person to act or forbear in favour of the person who is entitled to the right. It may also be known as the substance of the right
4. **Subject matter of Right** – It is something to which the act or omission relates, that is the thing over which a right is exercised. This may be called the object or subject-matter of the right. Some writers, although argue that there are certain rights which have no objects.
5. **Title of the Right** – Salmond has given the fifth element also, that is, “title”. He says that “every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner”.

Hence, it can be observed every right involves a three-fold relation, in which it stands I.

It is a right against some person or persons.

II. It is a right to some act or omission of such person or persons.

III. It is a right over to something to which that act or omission relates

The terms of ‘person’, ‘act’, ‘thing’ are connected with the term ‘Right.’

A popular illustration that was quoted by Salmond satisfies all the above mentioned elements of legal rights. It is as follows –

“If A buys , a piece of land from B, A is the subject or owner of the right so acquired. The persons bound by the correlative right are persons in general, for a right of this kind avails against all the world. The context of the right consists in non-interference with the purchaser’s exclusive use of the land. The object or subject-matter of the right is the land. And finally, the title of the right is the conveyance by which it was acquired from its former owner”

KINDS OF LEGAL RIGHTS

Jurists have classified legal rights in the following ways –

1. Primary and Secondary Rights
2. Public and Private Rights
3. Positive and Negative Rights
4. Vested and Contingent Rights
5. Perfect and Imperfect Rights
6. Principal and Accessory Rights
7. Legal and Equitable Rights
8. Proprietary and Personal Rights
9. Rights in *Rem* and Rights in *Personam*
10. Rights in *re Propria* and Rights in *re Aliena*

Primary and Secondary Rights

Primary Rights are also called antecedent rights. It is vested within a person by law or any other legal manner. These are the bundles of those rights which are the privileges enjoyed by any person e.g. a person's rights to Liberty.

A violation or breach of the primary rights, on the other hand, gives rise to a sanctioning right or remedial right. These are also known as secondary rights. It is also called the remedial or adjectival rights. It is called so as it is a mode of legal enforcement, for the loss of the primary right. It is subdivided into two kinds – 1. Right to exact and receive a pecuniary penalty from the defendant for loss of right and 2. Right to exact and receive damage for the injury caused to the defendant. It can be said that primary rights exist independently whereas secondary rights have no separate existence and arise only on violation of primary rights.

Public and Private Rights

Legal rights can be considered as both public and private. Public rights are those vested with the state. The state enforces such right as a representative of the subjects in public interest. A public right is possessed by every member of the public. For example, a right that is concerned with the Government may be termed as a public right such as the right to vote. A private right, on the other hand, is concerned with individuals, that is both the parties connected with it are private persons. For example, owning a vehicle is a private right.

Positive and Negative Rights

A right is considered as positive or negative depending upon its correlative duty. A positive right exists when the owner of it is entitled to something to be done by the person of incidence. A person possessing a positive right can compel the person with the duty to perform a positive act. For instance, a right to receive a compensation is a positive right. A negative right corresponds to a negative duty and is a right that the person bound shall refrain from

some act which would operate to the prejudice of the entitled; in other words, a negative right, corresponds a negative duty. It is a right of the person and the person bound shall restrain from doing some act which will be prejudicial to the person entitled, such as when a person owns a land, it is the duty of others to not trespass.

Every person is entitled to negative rights, but only a few get positive rights. The number of negative rights is larger than the positive rights. The difference between these rights is illustrated below –

1. A positive right corresponds to a positive duty whereas a negative right corresponds to a negative duty.
2. A positive right involves a positive act while a negative right involves some kind of forbearance or not doing.
3. A positive right entitles the owner of it to an alteration of the present position to his advantage whereas a negative right seeks to maintain the present position of things.
4. A positive right aims at some positive benefit but a negative right aims at not to be harmed.
5. A positive right requires an active involvement of others but a negative right requires only positive acquiescence of other persons.
6. A positive right receives something more than what one already has whereas a negative right seeks to retain what one already has.
7. A positive right has a mediate and indirect relation to the object while a negative right is immediately related to the object.

Vested and Contingent Rights

A vested right is a right in respect of which all events essential to vest the right in the owner have happened; while a contingent right is one in respect of which only some of the events necessary to vest the right have happened and the vesting can be complete only on the happening or non-happening of a specified uncertain event. A vested right is not dependent upon the fulfillment of any condition and a right becomes contingent only on the fulfillment of any condition that may either be subsequent or precedent. Vested rights are transferable and inheritable, this is not possible in contingent rights.

Perfect and Imperfect Rights – A perfect right is one which corresponds to a perfect duty and a perfect duty is one which is not only recognized by the law but is enforced also. Perfect right means the complete right, which signifies the right for which there is remedy also. This is explained by the latin maxim “*ubi jus ibi remedium*” which means, where there is a right, there is a remedy. When in case of the breach the right is not enforceable in a court of law then it is known as imperfect right. This was stated in the case of **Allen v. Waters & Co.** [(1935) 1 KB 200]. The Directive Principles of the State Policy that is present in the Indian Constitution is an example of imperfect rights.

Principal and Accessory Rights

A principal right is a primary right of a person vested in him by the law of the land, or through any other legal method. An accessory right is a right which is connected with the principal right. Principal rights exist independently while accessory rights are dependent upon principal rights. They are beneficial on the principal right.

Legal and Equitable Rights

These type of legal rights cannot be found in India. It is found only in England. Legal rights are those which were recognized by the Courts of Common Law in England and Equitable rights are those which were solely recognized in the Court of Chancery. The underlying principle in regards to equitable rights is that when there are two inconsistent equitable rights claimed by different persons over the same thing, the first in time shall prevail. Although, where there is a conflict between a legal right and an equitable right, the legal right shall take precedence over equitable right even if it is subsequent to the equitable right in origin. The Privy Council in **Chatra Kumari Devi v. Mohan Bikram** [(1931) 58 I.A 279] observed that the Indian law does not recognize legal and equitable estates.

Proprietary and Personal Rights

Proprietary Rights are rights that are related to a person's property whilst personal rights relate to one's body. Proprietary rights are transferable and personal rights are not. If the breach of a right can be measured in terms of money or it has money value then it is said that the person has proprietary right but if the breach of a right cannot be measured in money or it has no money value that that right is known or called as personal right. A personal right is uninheritable and dies with him.

Rights in Rem and Rights in Personam

These are also called real and personal rights. The modern terms right "in rem" and right "in personam" have been generalized, somewhat inaccurately, from Roman sources. A right in *rem* means a right available against the whole world whereas a right in *personam* is a right that is available only against specific number of people.

Rights in re Propria and Rights in re Aliena

Rights in *re Propria* and Rights in *re Aliena* are a classification of proprietary rights. Right in *re Propria* is the right in his own thing and if he has a right in the property belonging to another than he is said to have a right in *re Aliena*. A right in *re-Aliena* 'or encumbrance' has been defined by Salmond as one which limits or derogates from some more general right belonging to some other person in respect of the same subject-matter. Salmond refers to four classes of encumbrances, namely, i) Leases; ii) Servitudes; iii) Securities & iv) Trusts.

- i) Leases – A lease is an encumbrance of property vested in one person by a right to the possession and use of it vested in another person.
- ii) Servitude – A servitude is a right to the limited use of a piece of land unaccompanied either by the ownership or possession of it.
- iii) Security – Security is an encumbrance vested in a creditor over the property of his debtor for the purpose of securing the recovery of the debt.
- iv) Trust – A trust is an encumbrance in which the ownership of property is limited by an equitable obligation to deal with it for the benefit of someone else. The owner of the encumbered property is called the trustee and the owner of the encumbrance is the beneficiary of the trust.

ENFORCEMENT OF LEGAL RIGHTS

A legal right may be enforced through a Court of Law that has been established by the State. A legal right is generally enforced by awarding damages in civil cases. If damages don't suffice, the object itself may be restored. Specific performances may also be ordered by the court. Alternatively, the court may grant an injunction for the enforcement

of a legal right. The law of injunction is mentioned in Specific Relief Act, 1963. It is a prohibitive writ which restrains a party from doing an act that affects the plaintiff from enjoying his legal right.

Q. Explain the co-relation between rights and duties.

Whether rights and duties are correlative—There are two views about the question whether rights and duties are necessarily correlative.

According to one view, right is necessarily the correlative of duty. As duty is a burden enforced by law, so right is freedom allowed or power conferred by law. Therefore every right implies duty against somebody.

According to Salmond there can be no right without a corresponding duty, and no duty without a corresponding right any more than there can be a husband without a wife, or father without a child. Keeton follows this view.

The other view is that rights and duties are not necessarily correlative. According to this view duties are divided into relative and absolute, relative duties are those which have corresponding rights, absolute duties are those which have none.

Absolute duties—Austin thinks that there are duties which he names as absolute duties to which there are no corresponding rights. There are four kinds of such absolute duties; namely- (1) Duties to self; for instance, duty not to commit suicide or get intoxicated.

(2) Duty to undeterminate person or to the public for instance, duty not to commit nuisance.

(3) Duty to the Sovereign or the State. Hibbert. Alien and Markby are also of the view that the duty of the subject towards the State is absolute.

(4) Duty to one animal not a human being.

Austin's doctrine has been followed by Holland and Allen. Allen says that there are no correlative rights in the State. The duties enforced by the criminal law are absolute duty. Moreover when the tax is imposed by the State, the State gets a right to collect the tax and people/subjects become duty bound to pay the taxes so imposed by the State.

Criticism of Austin's view—Austin's theory of absolute duties is subject to the following criticism :

(a) The duty not to commit suicide is a part of criminal law.

(b) Duties towards God are not legal duties.

(c) Duties owed to State correspond to right.

Following the view of Salmond, Ponn says, "We cannot have a right without a corresponding duty or a duty without a corresponding right."

On the basis of the analysis of the conceptions of right, liberty, power and immunity,

Salmond suggests that—

(1) right is that which other persons ought to do in my behalf;

- (2) liberty is that which I may do without the interference of law;
- (3) power is that which I can do effectively against others;
- (4) immunity is that which other persons cannot do effectively in respect of me.

The concept of right and its legal correlatives can be better under-stood by the help of Hohfeld's Table representing the inter-relationship inherent between these jural concepts.

Q. 'Personality is a wider and vaguer term than humanity' – Analyse.

So far as legal theory is concerned, observes Salmond, a person is any being whom the law regards as capable of rights and duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man.

In the eye of law persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess judicial significance, and this is the exclusive point of view from which personality receives legal recognition.

Salmond defines a person in law as any being to whom the law attributes a capacity of interests and therefore of right, of acts and therefore of duties.

Persons so defined are of two kinds, distinguishable as natural and legal. A natural person is a being to whom the law attributes personality in accordance with reality and truth. Legal persons are beings, real or imaginary, to whom the law attributes personality by way of fiction, when there is none in fact.

Personality Is Wider and Vaguer than Humanity

Salmond says that personality is a wider and vaguer term than humanity. Persons in ordinary parlance are male and female human beings. The legal sense of persons is not identical with the ordinary sense. Legal personality is an artificial creation of the law.

All human beings do not necessarily possess legal personality. In Roman law slaves though human beings were not regarded as persons. They are treated as chattels destitute of any personality. Infants and lunatics enjoy a restricted personality.

Conversely entities other than human beings enjoy full legal personality, e.g., an idol or a corporation. An idol when installed in a temple is the physical personification of the deity and after consecration the stone image gets its soul breathed into it.

A joint stock company or a municipal corporation though regarded as persons in the eye of law are not human beings. A fictitious personality is assigned to them in such cases. Salmond is, therefore, right when he says that personality is a wider and vaguer term than humanity.

Q. Discuss briefly the theories of Corporate Personality. Discuss the liabilities of a Corporation. Distinguish between corporate aggregate and corporate sole.

Ethical Natural law philosophers of the 17th and 18th centuries as well as the metaphysical theorists of 19th century postulated the concept of will as an essential requirement for exercising legal right. They also believed that **personality is the subjective possibility of a rightful will.**

Legal personality is an artificial creation of law. Entities recognized by law are capable of being parties to a legal relationship. A natural person is a human being whereas **legal persons are artificial persons, such as a corporation, created by law and given certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being.** All legal persons can sue or be sued.

Theories of Juristic Personality

1. **Fiction Theory** – This theory was put forward by Von Savigny, Salmond, Coke, Blackstone, and Holland etc. According to this theory, the personality of a corporation is different from that of its members. Savigny regarded corporation as an exclusive creation of law having no existence apart from its individual members who form the corporate group and whose acts are attributed to the corporate entity. As a result of this, any change in the membership does not affect the existence of the corporation.

It is essential to recognize clearly the element of legal fiction involved in this process. A company is in law something different from its shareholders or members. The property of the company is not in law the property of the shareholders. The company may become insolvent, while its members remain rich.

Gray supported this theory by saying that it is only human beings that are capable of thinking, therefore it is by way of fiction that we attribute 'will' to non-human beings through human beings who are capable of thinking and assign them legal personality.

Wolf said that there are three advantages of this theory. It is analytical, more elastic and it makes easier to disregard juristic personality where it is desirable.

2. **Concession Theory** – This theory is concerned with the Sovereignty of a State. It pre-supposes that corporation as a legal person has great importance because it is recognized by the State or the law. According to this theory, a juristic person is merely a concession or creation of the state.

Concession Theory is often regarded an offspring of the Fiction Theory as both the theories assert that the corporation within the state have no legal personality except as is conceded by the State. Exponents of the fiction theory, for example, Savigny, Dicey and Salmond are found to support this theory.

Nonetheless, it is obvious that while the fiction theory is ultimately a philosophical theory that **a corporation is merely a name and a thing of the intellect**, the concession theory is indifferent to the question of the **reality of a corporation** in as much as it focuses only on the source (State) from which the legal power of the corporation is derived.

3. **Group Personality Theory or Realist Sociological Theory** – This theory was propounded by Johannes Althusius and carried forward by Otto Van Gierke. This group of theorists believed that every collective group has a real mind, a real will and a real power of action. A corporation therefore, has a real existence, irrespective of the fact whether it is recognized by the State or not.

Gierke believed that the existence of a corporation is real and not based on any fiction. It is a psychological reality and not a physical reality. He further said that law has no power to create an entity but merely has the right to recognize or not to recognize an entity.

A corporation from the realist perspective is a social organism while a human is regarded as a physical organism. This theory was favoured more by the sociologists rather than by the lawyers. While discussing the realism of the corporate personality, most of the realist jurists claimed that the fiction theory failed to identify the relationship of law with the society in general. The main defect of the fiction theory according to the realist jurists was **the ignorance of sociological facts that evolved around the law making process.**

Horace Gray, however, denied the existence of collective will. He called it a figment. He said that to get rid of the fiction of an attributed by saying that corporation has a real general will, is to derive out one fiction by another.

4. **The Bracket Theory or the Symbolist Theory** – This theory was propounded by Rudolph Ritter von Jhering (also Ihering). According to Ihering, the conception of corporate personality is essential and is merely an economic device by which we can simplify the task of coordinating legal relations. Hence, when necessary, it is emphasized that the law should look behind the entity to discover the real state of affairs. This is also similar to the concept of **lifting of the corporate veil.**

This group believed that the juristic personality is only a symbol to facilitate the working of the corporate bodies. Only the members of the corporation are ‘persons’ in real sense of the term and a bracket is put around them to indicate that they are to be treated as one single unit when they form themselves into a corporation.

5. **Purpose Theory or the theory of Zweck Vermogen** - The advocates of this theory are Ernst Immanuel Bekker and Alois von Brinz. This theory is also quite similar to the fiction theory. It declared that only human beings can be a person and have rights. This theory also said that a juristic person is no person at all but merely a “**subjectless**” property destined for a particular purpose. There is ownership but no owner. Thus a juristic person is not constructed round a group of persons but based on an object and purpose.

The assumption that only living persons can be the subject-matter of rights and duties would have deprived imposition of rights and duties on corporations which are non-living entities. It therefore, became necessary to attribute ‘personality’ to corporations for the purpose of being capable of having rights and duties.

6. **Hohfeld’s Theory**- He said that juristic persons are creations of arbitrary rules of procedure. According to him, human beings alone are capable of having rights and duties and any group to which the law ascribes juristic personality is merely a procedure for working out the legal rights and jural relations and making them as human beings.

7. **Kelsen’s Theory of Legal Personality** – He said that there is no difference between legal personality of a company and that of an individual. Personality in the legal sense is only a technical personification of a complex of norms and assigning complexes of rights and duties.

Advantages and disadvantages of separate legal entity concept

Legal protection: Forming a corporation offers legal protection because the business owner becomes a separate entity from the incorporated company, Inc. notes. This distinction protects business owners from personal lawsuits and corporate liabilities and secures their personal assets. A C corporation can be sued since it serves as its own entity. That means the company and all of its assets and equity are exposed to risks, while the owners remains safe.

Liability and Taxation: “Since a corporation is a separate and distinct legal entity, owners of a corporation are only indebted to the extent of their interest in the corporation,” according to Business Accent. This means that shareholders are not personally liable for any company debt and creditors cannot go after their personal assets for

business debts. Similarly, shareholders only pay taxes on any profits paid to them as salaries, bonuses or dividends and the corporation itself pays corporate rate taxes on any additional profits at the lower corporate rate.

Perpetual Existence: The main advantage of a corporation is its perpetual existence. Since the corporation is a separate legal entity from any of its owners, it does not dissolve when one owner leaves. If a shareholder dies, the company may transfer her shares in the same way as any other property, and the corporation is not negatively affected. This also allows a shareholder to disconnect from the corporation by selling all of her shares without ending the corporation. Keep in mind that when deciding to dissolve a company there are procedures and paperwork required.

Disadvantages: While a corporation offers many advantages, those same qualities can also make life more difficult. It costs money to incorporate your business, as “start up, operating and tax costs are not required of most other structures,” reports Business.gov. Corporations have rules to follow and you must adhere to the formalities of organizing and running the company. Increased business regulations lead to a large amount of paperwork required to both incorporate and keep accurate tax, business and monetary records as required by the **Liability of corporations**

Corporations are legal persons .it means that they have rights and liabilities .so far as rights are concerned there is no difficulty in their enforcement .But the liabilities of corporations present very complicated problems. How are the liabilities of an entity which is treated as person only by a fiction of law to be enforced against it? This problem shall be discussed under three headings:-

1. **Liability of a corporation in contract:** For entering into a contract two things are important i.e. the form of the contract and the capacity of the parties, a corporation has no material existence therefore it always through its agents. It signifies its assent through seal. Therefore the presence of the seal is considered as evidence of the assent of the body corporate. The power of the corporation to enter into contract is limited by the statute .and anything beyond the words of the statute is rendered as ultra vires. Therefore the corporation formed under a statute is liable only for the acts done within the ambit of the statute.
2. **Liability of corporations of torts:** as observed earlier a corporation always acts through its agents therefore the liability of the corporation for the torts is based on the principle of vicarious liability. A corporation is liable for the acts of its servants done in the course of employment but this rule applies only to those acts which are intra vires the corporation. Two things are taken into consideration while imposing the liability upon the corporation i.e. whether the act was done by the authority of the corporation or the act was done without the authority of corporation for the acts done with authority the corporation is liable but for the acts done without the authority the corporation could not be made liable.
3. **Liability for criminal acts:-** the earlier view was that the corporation cannot be made liable for criminal offences for the theoretical difficulties like how to attribute mens rea to the corporations and how can a corporation be punished. The procedural difficulties have been now been removed partly by legislations and partly by judicial decisions and in the recent years the corporations have been made liable for the criminal acts .for instance:- in the case of **D.P.P. v Kent and Sussex contractors** where the manager of the company has sent in false returns for the purpose of obtaining petrol coupons the court held the company liable and said that though the act was done through the manager the company was liable for the acts. In another case of **Moor v Bresler Ltd.** The court held the company liable for the criminal acts of the secretary. Moreover a suit can be filed against the company in the capacity of juristic person.

Difference between “Corporation Aggregate” and “Corporation Sole”

A corporation is an organized body of coexisting or successive persons which by a legal fiction is regarded and treated as itself a person. Corporations are of two kinds corporation aggregate and corporation sole.

Corporate Sole v. Corporate Aggregate

1. A corporate sole is an incorporated series of successive persons. Examples: President of India, Prime Minister, District Collector, Governor, King of England, King of Nepal, etc.

A corporate aggregate is an incorporated group of co-existing persons. Examples: all private limited companies, all public limited companies, multi-national corporations, public undertaking corporations.

2. "Corporate sole" is a fictitious person but filled by a man naturally created by god. "Corporate aggregate" is a fictitious body and created by the policy of men. They may also be called as "body's Politique".

3. A corporate sole is a legal person occupying it only one person at a time. A corporate aggregate has several members at a time.

4. Corporate sole are the public offices. Corporate aggregate are the private offices.

5. The primary object of corporate sole is to rule the country and it has "executive" character. The primary object of corporate aggregate is to do business.

6. Corporate sole is more permanent than corporate aggregate. Corporate aggregate is lesser permanent than corporate sole.

7. A legal person holding "corporate sole" shall have the properties – one belonging to the state and another to him. The property belonging to state shall be developed to his successors. The property belonging him shall devolve to his legal heirs. Similarly, corporate aggregate also shall have its own properties, debts, with which the share holders are not concerned. The share holders are concerned corporation / company subject to the extent of their share amount, not exceeding that. They have their own properties. The debts of the company are not having any connection with their own properties. The debts, profits, losses. Etc. are related to the share amount only.

8. A corporation sole does not require a seal, but a corporation aggregate can only act or express its will by deed under its common seal. The power to possess and use a seal is incidental to a corporation.

The existence of a common seal is evidence of incorporation and the non-existence of a common seal is evidence against incorporation. A corporation may change its seal at pleasure, so long as the seal which is actually used is applied as the seal of the corporation for the time being.

An essential element in the legal conception of a corporation is that its identity is continuous, i.e., the original member or members and his or their successors are one. Thus, where a liability or obligation is once binding on a corporation, whether sole or aggregate, it will bind the successors, even though they are not expressly named.

A corporation is distinct from its members. A corporation is a legal persona just as much as an individual. The liability of an individual member is not increased by the fact that he is the sole person beneficially interested in the property of the corporation.

After the dissolution of a corporation the members, in their natural capacities, can neither recover debts which are due to the late corporation nor be charged with the debts contracted by it.

Q. What are characteristics of Juristic person? How do these differ from those of a Natural Person?

The chief characteristics of an artificial, conventional or juristic person are the following:

1. A juristic person may be any subject-matter to which the law attributes a fictitious personality. There must exist a group of persons or mass of property as the case may be.
2. A juristic person is a legal creation. The group of persons or the mass in question is given the character of person either by means of (a) a general rule applicable wherever its conditions are satisfied, e.g., under the Companies Act, 1862, or by (b) a special Act of sovereign power, e.g., an incorporating statute or charter.

A mere association of individuals does not form a legal person until the law recognises, over and above the associated individuals, a fictitious being which represent them but it is not identical with them.

Legal personality is a particular device by which the law creates units to which it ascribes certain powers. One of the essential requirements of a legal personality is that the personality may, possess status.

The English law recognises two kinds of corporations, viz., corporation aggregate, e.g., a registered company, and corporation sole, e.g., the sovereign.

Different Types of Juristic Persons: Professor Keeton observes that the juristic person is the personifications of the sum total of legal rules applicable to a plurality of persons. The conception of juristic personality involves a double fiction, at first by fiction we create a unity and then by a second fiction we attribute to it the wills of individual men. Salmond defines a juristic person as any subject-matter other than a human being to which the law attributes personality.

Natural Person V. Juristic Person

- Natural Person is a Human Being. Legal Person can be a being - real or imaginary.
- Natural Person has the characteristics of the power of thought, speech and choice. A legal person is any being whom the law regards as capable of rights and duties.
- Natural Person is a real and living person. Legal persons can be 'fictitious', 'juristic', 'artificial' or 'moral'.
- Slaves are considered natural persons. In ancient law, slaves are not recognized as persons.
- Layman does not recognize idiot, company, corporation, idol etc as persons. According to Law, idiots, deadmen, unborn persons, corporations, companies, idols etc are treated as legal persons.
- The only natural persons are human beings. But, there are several categories of legal persons recognized by law.
- A Natural Person is also a Legal person. "Although all legal personality involves personification, the converse is not true".
- Natural Persons perform their functions and also perform the functions of legal persons. The legal persons perform their functions through natural persons only.

- Man is the only natural person. There are different varieties of legal persons viz. Corporations, Companies, Universities, Societies, President etc.
- There is division in regard to types of natural persons. There are two classes of corporations - Corporate Sole and Corporate Aggregate.
- Natural person can live for a limited period of time. i.e Till his death. Legal persons can live an eternal life. For example, the post of the President of United States of America is a corporation, which was created some three hundred years ago.

Q. State with reasons the legal status of unborn children and a deceased human being.

A natural person must be a living human being, i.e., must not be a monster and must be born alive to be ranked as a person in law. The exception to this rule is that of an infant en ventre sa mere (child in womb), who is supposed to be born for many purposes. A child in its mother's womb can acquire certain rights and inherit properly, but the rights are contingent on his being born alive. He is counted as a person for purposes of partition.

Such a child can claim damages for injury sustained while in its mother's womb. A pregnant woman condemned to death is respited as of right till the delivery of the child.

A child not yet conceived cannot be deemed to be a person, although provision may be made for such beings contingently coming into existence by vesting property in trustees for them.

The creation of proprietary rights in favour of unborn persons is governed by the rule against perpetuity. That rule provides that you cannot postpone vesting of an estate beyond a longer period than the lifetime of the transferee or transferees existing at the date of the transfer and the minority of the ultimate unborn beneficiary.

The contingent rights of unborn persons become vested on birth or at the end of such period not exceeding that prescribed by the rule against perpetuity, as may be fixed by the person granting the rights to unborn persons.

Legal status of Dead Person: Dead persons have no legal personality and hence, cannot sue and be sued. Dead men are no longer persons in the eye of law. Legal personality of a person dies with his person. They do not remain the owners of their property until their successors enter upon their inheritance. When a person dies leaving Will, his property is distributed according to the Will. Law recognises and takes account after the death of the person of his desires and interest when alive. There are three things in respect of which the anxieties of living men extend even after their death. Those are his body, his reputation and his property.

1) **His Body:** A living person is interested in the treatment to be given to his own body. A person is interested in a decent funeral and good burial. Criminal law secures a decent burial for all dead persons and the violation of a grave is a criminal offence. It is because to the respect the feelings of the relatives of a dead person, not in protection of dead person's right.

2) **His reputation:** Everyone is interested in maintaining reputation even after death. The reputation of a dead person receives some degree of protection from the criminal law. **Defamation** suit can be filed for loss of reputation of a dead person. If the publication is an attack on the internet of living persons, as a matter of fact, this right is in reality not that of the dead person but of his living descendants.

3) **His Property/ Estate:** A man is dead but his hand may continue to regulate and determine the enjoyment of the property he owned while he was alive. He can dispose of his property by WILL. when a person dies intestate (dies living will) the property is distributed according to the WILL.

Case law: William Vs. William 33 Bombay 122. In this case, court held that a person during his lifetime cannot make a Will, disposing of his body. e.g. giving his brain, bones etc to the museum or giving any part of his dead body to the medical college. But the trend changed today and it is legal to donate one's eyes of part of his body after his death.

Q. Discuss the concept of "Ownership". How is it acquired? What are the Kinds of Ownership.

Salmond on Ownership: Ownership denotes the relationship between a person and an object forming the subjectmatter of his ownership. It consists in a complex of rights, all of which are rights in rem, being good against the entire world and not merely against specific persons.

Incidence of Ownership

1. The owner has the right to possess things that he owns.
2. The owner normally has a right to use or enjoy the thing owned, the right to manage it, the right to decide how it shall be used and the right of income from it. However, Right to possess is not a right *strictu sensu* because such rights are in fact liberties as the owner has no duty towards others and he can use it in any way he likes and nobody can interfere with the enjoyment of his ownership.
3. The owner has the right to consume, destroy or alienate the things. The right to consume and destroy are again straight forward liberties. The right to alienate i.e. the right to transfer the existing rights involves the existence of power.
4. Ownership has the characteristic of being '**indeterminate in duration**' and Ownership has a **residuary character**. Salmond contrasted the rights of the owner with the lesser rights of the possessor and encumbrancer by stating that "*the owner's rights are indeterminate and residuary in a way in which these other rights are not*".

Austin's Concept of Ownership: Ownership or Property may be described accurately enough, in the following manner: '*the right to use or deal with some given subject, in a manner, or to an extent, which, though is not unlimited, is indefinite*'.

Now in this description it is necessarily implied, that the law will protect or relieve the owner against every disturbance of his right on the part of any other person. Changing the expression, all other persons are bound to **forbear** from acts which would prevent or hinder the enjoyment or exercise of the right.

Austin further said that "**Ownership or Property, is, therefore, a species of *Jus in rem*. For ownership is a right residing in a person, over or to a person or thing, and availing against other persons universally or generally. It is a right implying and exclusively resting upon obligations which are at once universal and negative**".

Dias on Ownership: After referring to the views of Salmond and other Jurists, Dias came to the conclusion that a **person is owner of a thing when his interest will outlast the interests of other persons in the same thing**. This is substantially the conclusion reached by many modern writers, who have variously described ownership as the 'residuary', the 'ultimate', or 'the most enduring interest'.

According to Dias, an owner may be divested of his claims, etc., to such an extent that he may be left with no immediate practical benefit. **He remains owner nonetheless.** This is because his interest in the thing, which is ownership, will outlast that of other persons, or if he is not presently exercising any of his claims, etc., these will revive as soon as those vested in other persons have come to an end.

In the case of land and chattels, if the owner is not in possession, **ownership amounts to a better right to obtain the possession than that of the defendant.** It is 'better' in that it lasts longer. It is apparent that the above view of Dias substantially agrees with that of Salmond. According to Dias it is the outlasting interest and according to Salmond, ownership has the characteristic of being indeterminate in duration and residuary in nature

SUBJECT MATTER OF OWNERSHIP: Normally ownership implies the following:

- The right to manage
- The right to possess
- The right to capital
- The right to the income

CHARACTERISTICS OF OWNERSHIP: An analysis of the concept of ownership, it would show that it has the following characteristics:

Ownership may either be absolute or restricted, that is, it may be exclusive or limited. Ownership can be limited by agreements or by operation of law. The right of ownership can be restricted in time of emergency. An owner is not allowed to use his land or property in a manner that it is injurious to others. His right of ownership is not unrestricted. The owner has a right to possess the thing that he owns. It is immaterial whether he has actual possession of it or not. The most common example of this is that an owner leasing his house to a tenant. Law does not confer ownership on an unborn child or an insane person because they are incapable of conceiving the nature and consequences of their acts.

- **Ownership is residuary in character.** The right to ownership does not end with the death of the owner; instead it is transferred to his heirs. Restrictions may also be imposed by law on the owner's right of disposal of the thing owned. Any alienation of property made with the intent to defeat or delay the claims of creditors can be set aside.

KINDS OF OWNERSHIP

There are many kinds of ownership and some of them are corporeal and incorporeal ownership, sole ownership and co-ownership, legal and equitable ownership, vested and contingent ownership, trust and beneficial ownership, co-ownership and joint ownership and absolute and limited ownership.

Ownership may be classified under the following heads :

Corporeal and Incorporeal Ownership: Corporeal ownership is the ownership of a material object and incorporeal ownership is the ownership of a right. Ownership of a house, a table or a machine is corporeal ownership. Ownership of a copyright, a patent or a trademark is incorporeal ownership. The distinction between corporeal and incorporeal ownership is connected with the distinction between corporeal and incorporeal things.

Incorporeal ownership is described as ownership over tangible things. Corporeal things are those which can be perceived and felt by the senses and which are intangible.

Incorporeal ownership includes ownership over intellectual objects and encumbrances.

Trust and Beneficial Ownership: Trust ownership is an instance of duplicate ownership. Trust property is that which is owned by two persons at the same time. **The relation between the two owners is such that one of them is under an obligation to use his ownership for the benefit of the other.** The ownership is called beneficial ownership. The ownership of a trustee is nominal and not real, but in the eye of law the trustee represents his beneficiary.

In a trust, the relationship between the **two owners** (one is trustee owner and another is beneficiary owner) is such that one of them is under an obligation to use his ownership for the benefit of the other. The former is called the trustee and his ownership is trust ownership. The latter is called the beneficiary and his ownership is called beneficial ownership.

In simple terms, A trust is an instance of duplicate ownership namely, trust ownership and beneficial ownership. In a trust certain property is given in trust or confidence to a person or a definite group of persons to be held under an obligation for the benefit of some other persons or group of persons.

Trust is defined as an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or (b) declared and accepted by him for the benefit of the other.

Legal and Equitable Ownership: Legal ownership is that which has its origin in the rules of common law and equitable ownership is that which proceeds from the rules of equity. In many cases, equity recognizes ownership where law does not recognize ownership owing to some legal defect.

Legal rights may be enforced in rem but equitable rights are enforced in personam as equity acts in personam. One person may be the legal owner and another person the equitable owner of the same thing or right at the same time.

The equitable ownership of a legal right is different from the ownership of an equitable right. The ownership of an equitable mortgage is different from the equitable ownership of a legal mortgage.

There is no distinction between legal and equitable estates in India. Under the Indian Trusts Act, a trustee is the legal owner of the trust property and the beneficiary has no direct interest in the trust property itself. However, he has a right against the trustees to compel them to carry out the provisions of the trust.

For information, but in English law recognises two forms of ownership—legal and equitable. In England before the passage of Judicature Acts of 1873, and 1875 there existed two kinds of Courts with two quite distinct jurisdictions. These two Courts were known as the Common Law Courts and the Equity Courts.

The rights recognised and protected by the Common Law Courts were called legal or Common Law Rights and the rights enforced by Equity Courts were known as equitable rights.

Legal ownership is, therefore, that ownership which was or recognised by the rules of Common Law, while equitable ownership is that which originated from the rules of equity.

Equitable ownership was thus not recognised by the Common Law Courts. The Chancery or Equity Courts recognised legal ownership as well as the equitable ownership.

Keeton says, *“This quality of legal and equitable ownership arises, whenever one person holds the legal title to property, the beneficial enjoyment of which is vested in another. Thus the legal owner is he whom the Common law could designate as the owner ; the Equitable owner is that person whom the Court of Chancery would formerly have protected in the enjoyment of a thing.”*

Vested and Contingent Ownership: Ownership is either vested or contingent. It is vested ownership when the title of the owner is already perfect. It is contingent ownership when the title of the owner is yet imperfect but is capable of becoming perfect on the fulfillment of some condition.

In the case of vested ownership, ownership is absolute. In the case of contingent ownership it is conditional.

For instance, a testator may leave property to his wife for her life and on her death to A, if he is then alive, but if A is dead to B. Here A and B are both owners of the property in question, but their ownership is merely contingent. It must, however, be stated that contingent ownership of a thing is something more than a simple chance or possibility of becoming an owner. It is more than a mere *spes acquisitionis*. A contingent ownership is based upon the mere possibility of future acquisition, but it is based upon the present existence of an inchoate or incomplete title.

It is vested when the owner's title is already perfect; it is contingent when his title is as yet imperfect, but is capable of becoming perfect on the fulfilment of some condition or contingency. Vested ownership is absolute, contingent ownership is conditional. It is subject to conditions and it may be made to commence or cease upon the ascertainment that a certain fact does not exist.

Thus, I may be the owner of a piece of land on condition of paying a certain fixed sum of money annually to the State. My ownership is thus conditional on the annual payment of the money.

Contingent ownership is not *spes acquisitionis*—Simple chance or mere possibility of becoming owners—but more than that. It is more than a mere future possibility but the existence of an inchoate or incomplete title in the present, capable of achieving completion and perfection on the happening of a given contingency in future.

The conditions on which ownership depends may be either 'condition precedent' or 'condition subsequent'. A condition precedent is one by the fulfilment of which a title is completed ; a condition subsequent is one on the fulfilment of which a title already completed is extinguished. In the former case ownership which was formerly conditional becomes absolute. In the later case the ownership which is already lost conditionally, is lost absolutely. In case of a condition subsequent ownership is not contingent but vested. For the condition attached to the ownership it is not with regard to commencement of ownership but with regard to continuance of it.

Sole Ownership and Co-ownership: Ownership may be either sole or duplicate. When it is vested in one person it is called sole ownership ; when it is invested in two or more persons at the same time, it is called duplicate ownership.

The chief instances of duplicate ownership are ;

- (i) Co-ownership;
- (ii) Trust and beneficial ownership; (iii) Legal and equitable ownership;
- (iv) Vested and, contingent ownership.

Co-ownership that is to say, ownership shared by several persons with equal or co-ordinate results may be of two kinds, namely:—

- (a) Joint ownership, and
- (b) Ownership-in-common.

(a) **'Joint ownership'** is that where on death of one of the co-owners the whole right ensures for the benefit of surviving co-owner or co-owners, until at last when the last survivor of the joint owners, dies, it would devolve on his heirs. The heirs of a predeceased co-owner will not get any share at all in the property of the joint owner.

(b) **"Ownership-in-common"** is that where, on the death of one of the co-owners, his heirs step into his shoes.

Ordinarily, a right is owned by one person only at a time. However, duplicate ownership is as much possible as sole ownership. When the ownership is vested in a single person, it is called sole ownership; when it is vested in two or more persons at the same time, it is called co-ownership, of which co-ownership is a species. For example, the members of a partnership firm are co-owners of the partnership property.

Under the Indian law, a co-owner is entitled to three essential rights, namely

- • Right to possession
- • Right to enjoy the property
- • Right to dispose

Co-ownership and Joint Ownership: According to Salmond, "co-ownership may assume different forms. Its two chief kinds in English law are distinguished as ownership in common and joint ownership. The most important difference between these relates to the effect of death of one of the co-owners. If the ownership is common, the right of a dead man descends to his successors like other inheritable rights, but on the death of one of two joint owners, his ownership dies with him and the survivor becomes the sole owner by virtue of this right of survivorship.

Absolute and Limited Ownership: An absolute owner is the one in whom are vested all the rights over a thing to the exclusion of all. When all the rights of ownership, i.e. possession, enjoyment and disposal are vested in a person without any restriction, the ownership is absolute. But when there are restrictions as to user, duration or disposal, the ownership will be called a limited ownership.

For example, prior to the enactment of the Hindu Succession Act, 1956, a woman had only a limited ownership over the estate because she held the property only for her life and after her death; the property passed on to the last heir or last holder of the property. Another example of limited ownership in English law is life tenancy when an estate is held only for life.

Q. Discuss Possession.

Obtaining possession of a property, and performing such action is far easy than defining it in words, i.e. what the word 'possession' implies. This statement is warranted and testified by the words of great Legal Scholar, **Salmond** too. To understand the concept, we must first need to understand the etymology of the word, i.e., the meaning of the word in its root, in its history. The word came from Roman law.

In Roman Law, Possession, i.e., *Possessio*, in its primary sense, is the condition or power by virtue of which a man has such a mastery over a corporeal thing as to deal with it at his pleasure, and to exclude other persons from meddling with it. This condition or power is detention; and it lies at the bottom of all legal senses of the word possession. This possession is no legal state or condition, but it may be the source of rights, and it then becomes *possessio* in a juristical or legal sense. Still, even in this sense, it is not in any way to be confounded with property (*proprietas*). A man may have the juristical possession of a thing without being the proprietor, and a man may be the

proprietor of a thing without having the juristical possession of it, and consequently without having the detention of it.

Ownership is the legal capacity to operate on a thing according to a man's please, and to exclude everybody else from doing so. Possession, in the sense of detention, is the actual exercise of such a power as the owner has a right to exercise.

The term *possession* occurs in the Roman legal framework in various senses. There is *possessio* generally, and *possessio civilis*, and *possessio naturalis*. *Possessio* denoted, originally, bare detention. But this detention, becomes a legal state, in as much as it leads to ownership through usucapion. Accordingly, the word *possessio*, which required no qualification so long as there was no other notion attached to *possessio*, requires such qualification when detention becomes a legal state. This detention, then, when it has the conditions necessary to *usucapion*, is called *possessio civilis*, and all other *possessio* as opposed to *civilis* is *naturalis*.

If the idea of possession had remained wedded to physical control, the position would have been simpler to explain the concept of 'possession'. Difficulties arise when it becomes necessary, because of the broadening of legal activities, to attribute to persons, who are not actually in control some or all of the advantages that were enjoyed by the persons actually in control. Tradition and technicality combined complicate the matter.

Traditionally, possession was the basis in law of these advantages. They attached to man because he had physical control, which was synonymous with possession, but when it became necessary to give the same benefits to a man who was not in control, possession came to be ascribed to him without the need of physical control. Reasoning then took the form that whenever a man has these advantages, this must be because he has possession. The consequence was to bring about a contract between 'actual holding' and 'possession' as well as a shift in the meaning of the term 'possession'.

Physical control came to be distinguished from possession under the nomenclature of 'custody' or 'detention'. A person is said to be in '**Custody**' where the holder either lacks full control or else has no animus to exclude others, for customer examining a ring in the presence of the jeweler. It simply means to take care and keep anything for a temporary period which belongs to another e.g., the property of the master in the custody of the servant. Mere custody, therefore, is insufficient to constitute possession. And the Roman term '**detentio**' means full physical control in fact which for some reason is not regarded as possession in law. Or it means to withhold or to keep in custody the goods from a person lawfully entitled to the possession of such goods.

If the control falls short of what the law requires, the person controlling the thing is said to have detention or custody merely.

Three situations had thus become possible.

1. A man could have physical control without possession and its advantages (*in case of a servant having physical control but immediate possession lies with the master*).
2. A man could have possession without physical control (*where a person goes outside his house every day for work though not in physical control would still have possession*),
3. Or he could have both.

Possession, therefore, becomes a technicality of law.

Salmond has pointed out two reasons for which the concept of possession is considered as one of the difficult legal concepts. First, possession is an abstract notion and involves the same sort of difficulties which we find with other abstract terms such as 'law' and 'rule'. Secondly, possession is not a pure legal concept.

Definitions:

Besides all of this, Different definitions provided by different sources (jurists, dictionaries) is enumerated as under:

Oxford Dictionary: The visible possibility of exercising over a thing such contact as attaches to lawful ownership. The detention or enjoyment of a thing by a person himself or by another in his name, the relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing permits to the exclusion of other persons.

Bentham: Possession is to recall the image which presents itself to the mind when it is necessary between two parties which is in possession of a thing and which is not.

Maine: Physical detention with the intention to hold the thing detained as one's own.

Holland: A moment reflection must show that possession in any sense of form must imply firstly, some actual power over the object possessed and secondly, some amount of will to avail oneself of that power.

Savigny: Intention coupled with the physical power to exclude others from the use of the material object.

Salmond: Possession of a material object is the continuing exercise of a claim to the exclusive use of it.

Pollock: Having a physical control over a thing constitutes possession.

Holmes: To gain possession a man must stand in certain physical relation to the object and to the rest of the world and must have a certain intent.

Why is understanding about 'Possession' important?

Possession is an evidence of ownership. Transfer of possession is one of the chief methods of transferring ownership. The possession of a thing 'even if it is wrongful' is a good title against the whole world except the real owner. That is why it is said that '*Possession is nine points of the law.*' Long possession creates ownership by prescription. Possession is the basis on the ground of obtaining certain legal remedies, for example, the possessory remedy. In certain cases, the possessor of a thing can confer a good title on a transferee of it though he himself has none. Possession plays a very important role in criminal law. In a number of offenses against property, possession becomes the main issue to be determined.

Why Law Protects Possession?

Rousseau, the French philosopher, was of the view that men are born free and equal. Freedom includes the freedom of will also. In possession individual's will is reflected, therefore it must be protected. The *Massachusetts Bill of Rights* also states the same thing.

Kant opines that "*the freedom of the will is the essence of man. It is an end in itself, it is that which needs no further explanation, which is to be absolutely respected and which it is the very end and object of the government to realize and affirm. Possession is to be protected because a man by taking possession of an object has brought it's within the sphere of his will. He has extended his personality into or over that object.*"

Hegel states that “Possession is a manifestation of individuals will. Therefore, it is entitled to absolute respect.”

Savigny states that “Possession is protected because every act of violence is unlawful. Savigny considers that the protection of possession as a branch of the protection of the person.

Holland similarly opines that the protection of possession is for the preservation of peace.

Elements of Possession.

Both in English (Also, in Indian Law) and Roman laws possession has two distinct elements. They are:

1. **Corpus Possidendi** – Physical control or power over the object possessed.
2. **Animus Possidendi** – Intention or will to exercise that power.

Both these are necessary to constitute possession. A person cannot be said to be in possession of a thing unless he has *animus possidendi*. **Markby** in this context says, ‘there are physical element and mental element in the legal conception and in order to constitute possession in a legal sense there must exist not only the physical power to deal with things as we like and to exclude others but also the determination to exercise that power or control on our own behalf.’

Corpus (physical control): It implies two things:

1. The possessor’s physical relation to the ‘res’ i.e., the object.
2. The relation of the possessor to the rest of the world, i.e. ability to exclude others.

Physical control of the thing lies at the bottom of possession. Possession must consist in the undoubted control over a thing to the exclusion of others. Possession must be direct, physical and actual, not merely symbolic or fictitious. However *direct contact need not be necessary with the thing* although it is true that most of the things that we possess are in direct contact with us. For example, a man walking along the road with a bundle sits down to rest and place his bundle on the ground at a short distance from him. No one thinks of doubting that the bundle remains in his exclusive possession, not symbolically but really and actually. ‘*Physical contact*’, therefore, is not necessary for possession. It is rather the possibility of dealing with the thing as we like and of excluding others.

The second element of the corpus is that the possessor must have the ability to exclude others. There is no hard and fast rule regarding the amount of power to exclude others. Therefore, ‘physical control’ does not mean ‘physical power’ to exclude others. Even the weakest person may have the corpus element (physical control). It depends more upon the general expectation that the possessor must have the ability to exclude others. In ***R v. Chissiers (1678 LR 275)***, a person came to a shop and asked for a particular kind of cloth (linen). The shopkeeper handed over some piece of cloth to him but before any sale was completed, he ran away with it. This was held to be larceny as there was no change of possession until he ran away. It is clear from this case that the corpus of possession is not necessarily synonymous with the physical power to exclude others, rather the expectation that the possessor has the ability to exclude others.

Animus: Animus is the conscious intention of an individual to exclude others from the control of an object. The mental element in possession may be manifested in the following ways :

1. The person holding the property need not be the owner and may exercise animus to exclude others on behalf of the owners. Ex:- A tenant or a mortgagee, e.g. has possession no less than that of the owner himself. (It may be described as representative possession).
2. The animus to exclude others need not be in the interest of the possessor or on his own behalf but in the interest of bailee or lessor. A carrier of goods, a servant or a trustee may have true possession (by having corpus as well as animus) though he makes no claim to the thing possessed on his own behalf of the owner.
3. Animus to exclude others need not be specific. A person having a library has the possession of every book in the library though he might have forgotten the existence of some of the books.
4. The animus to exclude others need not be based on a legally enforceable claim. It may be the result of a wrongful act. Thus, if 'B' steals goods from 'A' and 'C' in turn steals it from 'B', then although 'A' has a right of claim against both 'B' and 'C' yet in spite of this 'B' as a prior possessor (although a thief) against 'C' and theoretically he can legally recover possession of the goods from 'C'.
5. The animus to exclude others need not be absolute. Sometimes a person may possess a piece of land notwithstanding the fact that some other person or even the public at large, possess a right of way over it.
6. The relation of the possessor to the rest of the world, i.e. ability to exclude others.

Modes of Acquiring Possession

Transfer or acquisition of possession can be done in three ways, **By taking**, **By delivery** and **By the operation of Law**.

- As regards the acquisition or transfer of possession **by taking**, it is done without the consent of the previous possessor. This also may be done in two ways. One is called the rightful taking of possession and the other the wrongful taking of possession. A shopkeeper is entitled to get some money from a customer. This is an example of the rightful taking of possession. If a thief steals from an individual, his acquisition of possession is wrongful. However, if a person captures a wild animal which does not belong to anybody, possession is called original.
- Another way of acquisition of possession is **by delivery** or *traditio* in such a case, a thing is acquired with the consent and cooperation of the previous possessor, delivery is of two kinds, *Viz., Actual* and *constructive*. In the case of *actual delivery* immediate possession is given to the transferee. There are two categories of actual delivery. According to one category, the holder retains mediate possession and according to the other, the holder does not retain mediate possession. *Constructive delivery* is that which is not direct or actual. There are certain things which cannot actually be Transferred by the owner to the purchaser or by the transferor to the transferee. In such Cases, constructive delivery alone is possible.
- Transfer of possession can be made by the operation of law as well. This happens when, as a result of the law, possession changes hands. If a person dies, the possession of his property is transferred to his successor and legal representatives.

Kinds of Possession:

- **Corporeal** – It is claimed to the exclusive use of material things like land, buildings and other movable or immovable things. The exercise of this claim consists of two ingredients, *Corpus Possessionis* and *Animus Possidendi*. This case of possession consists of firstly, continuous exclusion of alien interference. Secondly,

enjoyment of the thing at will without interference by others. The actual use of it is not essential. A man may lock his watch in a safe and don't look at it for 20 years. Here he has exercised continuous claim to it, by continuously excluding any other person from interfering with it.

- **Incorporeal** – It is connected with intangible things such as trademark, goodwill, right to vote, right to passage, etc. In this case, things are to be used continuously, as non-use of it may give rise to the nonexistence of possession for such thing. One can acquire and retain possession of a right of way only through actual and repeated use of it. English law defined it as the continuing exercise of right rather than the continuous exercise of the claim.
- **Actual** – Where the thing is in the immediate occupancy of the party.
- **Constructive** – Possession not actual but assumed to exist, where one claims.
- **In law** – It is known as *de jure*. One may not have physical custody of the thing, but he may have a legal right to possess that thing, i.e., he may have 'legal possession', without having even 'actual possession'.
- **In Fact** – It is also known as *de facto*. It exists when the thing is in immediate occupancy of a person. The person has physical control of the thing to the exclusion of others. And has animus and corpus over the material object. It is an actual possession, which can be held to be prima facie evidence of ownership.
- **Mediate and Immediate** – In law, one person may possess a thing for and on account of someone else. In such a case the latter is in possession by the agency of him who so holds the thing on his behalf. The possession thus held by one man through another may be termed *mediate*, while that hitches acquired or retained directly or personally, may be distinguished as *immediate or direct*. 'Mediate possession' is also known as indirect possession. It has three kinds:
 1. The first is that, where a person acquires a thing, being a servant or agent. In such a case, that servant or agent acquires or retain possession, on behalf of his master. In all such cases, the mediate possession lies with the master only, though he may not have custody of the object.
 2. The second is that, where the direct possession lies in the person, who holds it for his own possessory right and also on behalf of a person having superior right to obtain from him the direct possession whenever he chooses to demand it. That is to say, it is the case of a borrower or tenant at will. He does not lose possession of a thing because he has lent it to someone who acknowledges his title to it and is prepared to return it to him on demand, and who in the meantime holds and looks after it on the behalf of a person having legal title.
 3. The third form is where the immediate possession is in the hands of a person who claims it for himself until some time has elapsed or some condition has been fulfilled, but who acknowledges the title of another for whom he holds the thing, and to whom, he is prepared to deliver it when his own temporary claim has come to an end. An example is a lease or mortgage.
- **Natural** – Corporal detention of a thing which we possess as belonging to us, without any title to that possession or with a title which is void.
- **Derivative possession** – The kind of possession of one who is in the lawful occupation or custody of the property, but not under a claim of title of his own, but under a right derived from another, as, for example, a tenant, bailee, licensee etc.

- **Adverse** – The actual, open, and notorious possession and enjoyment of real property, or of any estate lying in grant, continued for a certain length of time, held adversely and in denial and opposition to the title of another claimant, or under circumstances which indicate an assertion or colour of right or title on the part of the person maintaining it, as against another person who is out of possession.
- **Naked** – Mere possession, without color of right. Spoken of as the lowest and most imperfect degree of the title.
- **Open** – Possession of real property is said to be “open” when held without concealment or attempt at secrecy, or without being covered up in the name of a third person, or otherwise attempted to be withdrawn from sight, but in such a manner that any person interested can ascertain who is actually in possession by proper observation and inquiry.
- **Pedal** – In establishing title by adverse possession this means actual possession; that is living upon or actually occupying that land, or placing improvements directly upon it.

Theories of Possession:

- **Savigny's Theory:** Savigny was the first to give a theory on possession. He based his work on the text of He said possession consists of two ingredients, first is *corpus possessionis* (effective control) and other being *animus domini* (the intention to hold as owner). He believed since possession involved both of these, the permanent loss of one or the other brought possession to an end. Savigny further observed that the essence of possession is to be found in the ‘physical power of exclusion’. He says that the *corpus possessionis* may be of two kinds, one relates to the initiation or commencement of possession and the other relates to the retention of possession. The *corpus*, which is required at the commencement of possession is the ‘present or actual physical power’ of using the thing by oneself and excluding others from the use of it; Whereas the *corpus*, which is required for the retention of the possession already acquired, may consist merely in the ‘ability to reproduce the power at will.’

Thus, according to Savigny, for getting the possession of a horse, he says, “*I must take him by the bridal or ride upon him or have him in my immediate presence, so that I can prevent all other persons from interfering with me. And since detentor and possessor have same physical relation to the ‘res’, the difference between them must be found in the mental element, i.e., animus domini.*” Thus, he emphasizes intention as well as physical control to complete possession.

- **Jhering's Theory:** He approached possession as a sociological jurist. He posed the question why Roman law protected possession by means of *interdicts* (remedies given on the basis of the possession). He says that it was devised to benefit the owners by protecting their holding of property and so placing them in the advantageous position of defendants in any action as to Title. He said, “*whenever a person ‘looks like an owner’ in relation to a thing he has possession, possession can’t be denied to him unless by rules of law, based on ‘practical convenience’.*” According to Jhering, what is necessary, is the awareness of the thing which can give possession to the person. His approach is said to be more practical than Savigny. He gave a functional definition of possession, while also emphasizing on the point that concept of ‘possession’ may change meaning in different frames of law.
- **Holme's Theory:** Holmes starts by refuting a “*priori*” philosophical idea, perceiving that fewer facts are required to initiate possession than to acquire it. He points out, that, “*To gain possession, then a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent.*”

These relations and this intent are the facts of which who are in search." Holmes suggested that English law does not require the '*animus domini*' element, but merely the intent to exclude others.

- **Salmond's Theory:** Salmond rejected two different conceptions of possession, *possession in fact* and *possession in law*. Salmond said that there is only once conception that is possession in fact, which is possession "*in truth and in fact*". In law, the exercise of possession depends solely on the criteria of common sense, and further, since, possession of law is identified with possession in fact, so possession in law, for him, is fictitious. He then draws a line between, 'corporeal possession' and 'incorporeal possession'. Former includes, 'continuing exercise of a claim to the exclusive use of it'. According to him, this continuing exercise of claim, consists of two elements; *corpus possessionis*, and *animus possidendi*. Thus, for Salmond, possession is both corpus and animus. Former comprises of both the power to use the thing possessed and the existence of grounds for the exception that the possessors use shall not be interfered with. The latter, on the other hand, consisted of an intent to appropriate to oneself the exclusive use of the thing possessed. Salmond's *animus possidendi*, is an adoption of the modified version of Savigny's *animus domini*.
- **Pollock's Theory:** Pollock says, that, "*in common speech, a man is said to possess or to be in possession of anything which he has the apparent control, or from the use of which has the apparent power of excluding others.*" Pollock lays stress, not on 'animus' but 'de facto' control, which he defined as physical control. A general intent is sufficient.

The relationship between Possession and Ownership:

Simply, in layman terms, ownership gives the person 'a whole set of a bundle of rights', and possession is merely one small part of that bunch of rights. Some scholars defined ownership as:

According to **Pollock**, "*ownership may be described as the entirety of the powers of use and disposed of allowed by law. The owner of a thing is not necessarily the person who at a given time has the whole power of use and disposal; very often, there is no such person. We must look for the person having residue of all such power when we have accounted for every detached and limited portion of it, and he will be the owner even if the immediate power or control and use are elsewhere.*"

According to **Salmond**, "*ownership in its widest sense implies, the relation between a person and any right that is vested in him.*"

Sir Henry Maine suggests that, historically, the concept of possession is prior to that of ownership. In fact, the right of possession has evolved out the right of ownership.

In terms of the distinction between these 2 concepts, **Salmond** says, "*Possession is in fact what ownership is in right. Possession is the de facto exercise of a claim; ownership is the 'dejure' recognition of one. A thing is owned by me when my claim to it is maintained by the will of the state as expressed in the law; it is possessed by me when my claim to it is maintained by my own self-assertive will. Ownership is the guarantee of the law; possession is the guarantee of the facts. It is will to have both forms of security if possible, and indeed they normally co-exist.*"

The right of ownership is superior and comprehensive and it includes the right of ownership. Generally, ownership and possession coincide and their separation is due to special reasons. They are very akin to each other and are of the same species. Ownership tends to realize itself into possession and possession tends to become ownership. The one cannot remain divorced from the other for a very long time.

Possession for a long time ripens into ownership (As in the case of adverse possession, though the length of time differs in different jurisdictions, in India it is 12 years) and ownership without possession for a long time is destroyed. Rights called possession and ownership are attached to two different set of facts. The facts to which the right called possession is attached are “*corpus*” and “*animus*”.

The facts to which the right called ownership is attached are possession of “*res nullius*” or prescription “*possession of the object for a prescribed period without the consent of the previous owner*”, or conveyance from the previous owner of the object. Sometimes, rights analogous to those of ownership may be given by the legislature to persons of whom a defined set of facts is true, such as patentee.

The concept of Possession in India: Possession, which was a highly technical institution in ancient India, was recognized by the Hindu law as of two kinds, i.e., with the title and without the title. Possession ‘without title’ was stated to have never created ownership and a person who was in possession of a thing or land without title was considered as a thief. *Yajnavalkya* in his smriti, has pointed out that “*a man who sees his property being enjoyed by others and does not complain about it; he loses it after twenty years. In case of other properties ownership lapses after ten years by adverse possession.*” *Gautam* and *Narada* too agrees with the above statement that in the land a person loses ownership after twenty years and in wealth after ten years.

This clearly shows that concept of ‘adverse possession’ was recognized in ancient India. Consequent to the introduction of the common law in India during the British rule, *corpus* and *animus* came to be recognized as essential elements of possession. The Indian law, however, does not accept the distinction between possession and custody.

Section 145, the Code of Criminal Procedure, 1973 and Section 6 of the Specific Relief Act, 1963 are important enactments in the statute books of India which protect possession. Under section 145, CrPC, an executive magistrate is empowered to make enquiry as to which of the parties was in possession at the time of his initial order without reference to the merits of their claims and to order that if any person has been dispossessed he should be put back in possession.

Under Section 6 of the Specific Relief Act, if any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may by suit within six months recover possession thereof, notwithstanding any other title that may be setup in such suit. Section 100 of the Indian Evidence Act, also protects the possession of a person in the sense, that it throws the burden of proof to the person who challenges the possession of the possessor on the basis of his title, or otherwise. To recover the possession, the plaintiff must show a better right in himself than is in the defendant.

Conclusion: It needs to be understood that, possession is the real situation, and ownership is the abstract law. If ownership or title of a property is disputed, then the person having possession has a heavy weight on his side. The person, claiming against the possessor, has to thus fight hard, to reclaim the possession, even if he is the owner of the property. In India, the pendency of civil disputes causes much distress to the parties, and the original parties, normally do not get the relief, rather their heirs get relief after the proceedings of more than 30-40 years. Hence, One must take every such step to protect possession of his property and to prevent other from dispossessing him, and such step must be taken not with any delay, as its consequences are grave.

Q. Distinguish between:

a. Mediate and Immediate possession.

Immediate Possession

1. Immediate possession is also called as “direct possession”.
2. If the possessor possessed the thing himself it is called immediate possession.
3. If you purchase a book from the book shop personally and have it with you, it is immediate possession.
4. I own a house and reside in it. It is in my immediate possession.
5. (a) The pledge has immediate possession of the thing pledged. (b) I ride my bicycle. It is immediate possession.

Mediate Possession

1. Mediate possession is also called as “indirect possession”.
2. When the thing is possessed through the intervention or agency of some other person, then it is called mediate possession.
3. If you send your friend to purchase a book from you're to Hyderabad, and that friend purchases a book in Hyderabad for you, and possesses it. His possession is mediate until he delivers it to you.
4. I let my house to you. You are bound to hand over the house to me whenever I desire. You have immediate possession, and I have mediate possession of house through you.
5. I send my servant on my cycle to purchase vegetables. I have mediate possession of my cycle through my servant. My servant has immediate possession of cycle.

b. Supreme and Sub-ordinate legislation

Supreme Legislation

1. SALMOND defines: “supreme legislation proceeds from the supreme or sovereign power in the state, and which is therefore incapable of being repealed, annulled or controlled by any other legislative authority”.
2. Supreme legislation is one and parliament has the supreme authority.
3. It cannot be repealed, annulled or controlled by any other legislative authority, except parliament.

Subordinate Legislation

1. SALMOND defines: “subordinate legislation is that which proceeds from any authority other than the sovereign power, and is therefore dependent for its continued existence and validity on some superior or supreme authority”.
2. Subordinate legislation is of several kinds. All other forms of legislative activity recognized by the law are subordinate legislation.

3. It can be repealed, annulled or controlled by parliament.

c. Ratio Decidendi and Obiter Dictum.

1. Ratio decidendi may be described as rule of law applied by and acted on by the court, or the rule which the court regarded as governing the case. An obiter dicta is a statement made by a judge in course of his judgement which may not be precisely relevant to the issues before him.
2. The ratio decidendi has binding authority and is binding on subordinate courts. An obiter dicta has no such authority. It is a casual expression by the courts which carries no weight.
3. According to Goodhart, the rule of law based on material facts are ratio decidendi. The rule of law based on mere hypothetical facts are obiter dicta.
4. Ratio decidendi is a rule of law expressly or impliedly treated by the judge as a necessary step in reaching the conclusion. An obiter dicta is a rule of law stand by a judge which was neither expressly or impliedly treated by him as a necessary step in reaching his conclusion.

The distinction between ratio decidendi and obiter dicta can better understood by the following example.

In **S. R. Bommai Vs Union Of India**, the nine judges bench of the supreme court unanimously held that secularism is one of the basic structure of the constitution of India.

Justice Swant and Kuldeep Singh observed that social pluralism is one of the basic structure. While justice Ramaswamy observed that socialism, social justice and fraternity are included in the basic structure of the constitution.

The observation of the learned judges are obiter dicta as they are not directly in issue in the instant case. The ratio of the case is that secularism is one of the basic structure of the constitution of India

d. Right in Rem and Right in Personam

1. A right in rem is available for a person against the world at large, where as a right in personam is available only against a particular person.
2. The people of the world have a duty not to interfere with my possession. Nobody has right to disturb my possession and enjoyment.

I have a right to receive rent from my tenant. This right to receive rent from my tenant. This right to receive rent is a right in personam. The rest of the world is not concerned with this right.
3. I can use my money as like. The world at large has no right to interfere with my possession.

A debtor has to give me Rs. 5,000/-, who had taken from me as a loan. I have the right in personam to receive back the sum of Rs. 5,000/- from him.

4. Right in rem is called the “real right”. Converse this right; there is a duty upon every person of the world not to interfere with other’s rights. whereas right in personam is also known as “personal right”. Converse this right, there is a duty imposed upon determinate individuals.
5. Right in rem protects interest of a person against the world at large on the other hand right in personam protects an interest solely against determinate individuals.
6. Patent rights, copy right, etc. are the best examples for the rights in rem. Purchase of good-will of business is the best example for the right in personam.
7. All rights in rem are negative whereas all rights in personam are positive.
8. Right in rem is available against an open or indefinite class of persons. Right in personam is available only against a specific person or persons.
9. All “general offers” are “rights in rem”. All “specific offers” are “rights in personam”

Q. Write short note:

a. Law and Morality

At first there seems to be no distinction between law and morality. There are passages in ancient Greek writers, for example, which seem to suggest that the good person is the one who will do what is lawful. It is the law givers, in these early societies, who determine what is right and wrong.

But it is not long before thoughtful people recognize the difference between what is actually legal, or legally right according to the political authorities and what should be legal. What should be legal roughly corresponds to what is really right or just, that is, what we would call morally right. We find, for instance, the distinction between what is legally or conventionally right and what is naturally (or as we would say today morally) right.

Sometimes this is expressed as an opposition between what the gods command (i.e., what is morally right) and what the political authorities command (i.e., what is legally right). This is dramatically illustrated in Sophocles' tragedy *Antigone*, in which the heroine defies the decree of the king (the source of "legal right" in the circumstances) and buries her brothers (an act the audience would assume was morally right).

The contrast between what the state demands and what the gods demand is not the only way that this legal v. moral distinction is expressed. We find it also in the important Greek philosophers, who frequently discuss the distinction in terms of appearance and reality, or between what superficially seems or appears to be the case and what a thorough rational investigation reveals.

Plato, for example, holds that knowledge of what is just or moral, and the ability to distinguish true justice or morality from what is merely apparently just depends on the full development and use of human reason. According to Plato, there is a very close connection between true justice or morality and human well-being or flourishing. Legal and political arrangements that depart too far from true justice should, if possible, be replaced by arrangements that better promote justice and thus well-being.

Ethics, therefore, has claimed a right to criticize legal arrangements and recommend changes to them. Many debates about the law, when they are not merely debates about how legal precedent mechanically applies in a particular situation, are also ethical debates.

Let's summarize the relationship between morality and law.

- (1) The existence of unjust laws (such as those enforcing slavery) proves that morality and law are not identical and do not coincide.
- (2) The existence of laws that serve to defend basic values--such as laws against murder, rape, malicious defamation of character, fraud, bribery, etc. --prove that the two can work together.
- (3) Laws can state what overt offenses count as wrong and therefore punishable. Although law courts do not always ignore a person's intention or state of mind, the law cannot normally govern, at least not in a direct way, what is in your heart (your desires). Because often morality passes judgment on a person's intentions and character, it has a different scope than the law.
- (4) Laws govern conduct at least partly through fear of punishment. Morality, when it is internalized, when it has become habit-like or second nature, governs conduct without compulsion. The virtuous person does the appropriate thing because it is the fine or noble thing to do.
- (5) Morality can influence the law in the sense that it can provide the reason for making whole groups of immoral actions illegal.
- (6) Law can be a public expression of morality which codifies in a public way the basic principles of conduct which a society accepts. In that way it can guide the educators of the next generation by giving them a clear outline of the values society wants taught to its children.

b. Theories of punishment

Various theories are advanced in justification for punishing the offender. The view regarding punishment also kept changing with the changes in the societal norms. They are of following kinds:-

1. **Deterrent theory:** The term 'Deter' means to abstain from doing an act. While the main purpose of this theory is to deter the criminals from doing the crime or repeating the same in the future. Under this theory, severe punishments get impose upon the offender so that he abstains from committing a crime while it would constitute as a lesson to the other member of the society.

In the words of Salmond- punishment is before all things deterrent and the chief aim of the law of crime is to make the evil-doer an example and warning to all who are like minded as him. He further stated that offenses are committed by reason of conflict of interest of the offender and the society.

While this theory concept could be determined in the words of Manu from ancient India. According to him punishment or "dandh" are the sources of righteousness because people abstain from committing wrongful acts through the fear of punishment.

2. **Retributive theory:** This theory is based on the principle-'An eye for an eye, a tooth for a tooth...' here, retributive means to give in return. The object of the theory is to make the criminal realize the sufferings of the

pain by subjecting him to the same kind of pain, as he had imposed on the victim. The theory has been regarded as an end in itself as it only aims at revenge taking rather than sound welfare and transformation.

Salmond puts his words stating that to suffer punishment is to pay a debt due to the law that has been violated. Revenge is the right of the injured person and the penalty for wrongdoing is a debt which the offender owes to the victim and when the punishment is given the debt is paid.

While this theory was never recognized as a just theory because it plays a role in self-motivation for committing a crime on the ground of justice for injustice. Overall it could be stated as it was a kind of abatement prompted by society to victims.

3. **Preventive theory:** The preventive theory is founded on the idea of preventing the repetition of crime by disabling the offender through measures such as imprisonment, forfeiture, death punishment, etc. In the words of Paton, 'this theory seeks to prevent the prisoners from committing the crime by disabling him.' It presupposes that need of punishment for crimes simply arises out of social necessities, as by doing so the community is protecting itself against anti-social acts which are endangering social order.

However, this theory was also not a just method as stated by jurist Kant and others that merely by awarding a term of imprisonment is not going to reduce the crime unless reformatory efforts are made to integrate him in the mainstream of society through the process of rehabilitation.

4. **Expiatory theory:** This theory is solely based on the concept of morality, rather being much more concerned with legal concepts. It emphasizes more on ancient religious perceptions regarding crime and punishment when prisoners were placed in isolated cells to repent or expiate for their crime or guilty from their core of the heart and the one who succeeded in doing so were let off.

This theory is based on ethical considerations due to which it lost its relevance in the modern system of punishment.

5. **Reformatory theory:** This theory emphasizes the reformation of offenders through the method of individualization. It is based on the principle of humanistic principle that even if an offender commits a crime, he does not cease out to be a human being. And an effort should be made to reform him during the period of incarceration. This theory is based on the principle of 'hate the sin, not the sinner.'

The focal point of the reformist view is that an effort should be made to restore the offender to society as a good and law-abiding citizen. The Supreme Court in the case of **T.K.Gopal v. State of Karnataka AIR 2000 SC 1669(1674)** stated that- the law requires that a criminal should be punished and the punishment prescribed must be meted out to him, but at the same time, reform of the criminal through various processes, despite he has committed a crime, should entitle him all the basic rights, human dignity, and human sympathy.

b. Concept of Justice

The concept of justice is as old as the origin and growth of human society. A man living in society desires peace and, while living in he tends to experience a conflict of interests and expects a rightful conduct on the others part. And this is why jurists like Salmond and Roscoe Pound have emphasized the importance of justice.

Through the instrumentality of law regulated by the state, the concept of justice became more clear. As the law grew and developed the concept of justice walked parallel and expanded its tentacles into different spheres of human activities. The essence of legal justice lies in ensuring uniformity and certainty of law and at the same time ensuring

the rights and duties duly respected by all. The notion of justice is the impartiality imbibed in it. The violation of justice which is enforced by the law results in state sanction as 'punishment'.

In the words of Chief Justice Coke it has been rightly said that 'wisdom of law and justice is wiser than man's wisdom,' thereby legal justice represents the collective wisdom of the community which Rousseau called as 'General Will' of the people.

Definition: The term justice has been derived from the Latin word 'Jungere' which means to bind or tie together, thus in this way it can be stated as justice is the key ailment which ties the individuals in the society together and harmonizes a balance between them and enhances human relation.

In the words of jurists-

- **Blackstone-** "Justice is a reservoir from where the concept of right, duty, and equity evolves."
- **Salmond-** "Though every man wants to be righteous and just towards him, he himself being 'selfish' by nature may not be reciprocal in responding justly." According to him, some kind of external force is necessary for maintaining an orderly society, and without justice it is unthinkable.

Types of Justice

Justice represents itself in kinds mainly:-

- **Social Justice:** In the words of Chief Justice, P. B. Gajendragadkar - social justice means ending all kinds of social inequalities and then provide equal opportunities to all.

Commenting on social justice Mr. M.C. Chagla, the former Chief Justice of the Bombay High court observed in the case of **Prakash Cotton Mills v. State of Bombay, 1957 II LJ 490 (Bom)** that " we are no longer living in the laissezfaire..... it is true that social justice is imponderable and we asked not to introduce the principles of social justice in constructing legislation that comes for interpretation before us. But in our opinion, no economic, social or labor legislation can be considered by the court without applying the principles of social justice in interpreting these related provisions of law."

While in the case of **State of Mysore v. Workers of Gold Mines 1958 II LJ 479 (SC)** the Supreme Court observed that the concept of social justice is a living concept of revolutionary impact: it gives substance to rule of law and meaning and significance to the idea of welfare of the state.

Thus, the concept of social justice aims to uplift the underprivileged section without unduly and unreasonably affecting the interests of the upper section of the society. The concept of social justice finds its expression in Articles 14(equality before law), 15(prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth), 16(equality of opportunity in matters of public employment) and 39 (b) and (c) [(b) ownership and control of the material resources and its equal distribution, (c) operation of the economic system not resulting to the concentration of wealth and means of production to the common detriment], of the constitution of India.

It also determines the concept of Processual Justice based on natural law which is the very basis of not only substantive law but also the remedial justice. Legal maxims like **Nemo Judex In Propria Cause** (no one can be a judge in his own case); **Audi Altrem Partem**(here the other side or party)plays a vital role.

- **Economic Justice:** It demands that all citizens should have adequate opportunities to earn their livelihood and get equal pay for equal work, which could substantially help them in fulfilling their basic needs. From

financial inclusion to better health care the state government should create opportunities for them by generating employment opportunities, following MNREGA, RSBY and so on. No person or group of person should indulge themselves in exploitation and be exploited. There must be a fair and just equitable distribution of wealth and resources, and the gap between rich and poor should get abridged.

- **Political Justice:** It means granting of equal political rights and opportunities to all citizens to take part in the administration of the country. The legality of the right to vote and contest election free and fairly.
- **Legal Justice:** It has two dimensions as the formulation of just laws and then to do justice according to it. While making laws the will of the rulers must not be used on ruled. Laws should be based on public opinion and public needs considering the core of social values, morality and the concept of just and unjust must be considered. It simply means rule of law and not the rule of person. Objective due dispensation of justice by the courts of law is an essential ingredient of legal justice.

Administration of Justice

Origin: The administration of justice in modern civilized societies has evolved through 4 stages:-

1. Primitive stage- when society was primitive and private revenge and self-help were only the remedies available to the wrongdoer, one could easily get the wrong redressed with the help of his friends and relatives, 'an eye for an eye, a tooth for a tooth and a limb for a limb.'
2. Elementary/Infant stage- it has been considered that law and state were at infancy level during this stage, and the feeling of security as a responsibility by the state towards its individual and his property was absent. It didn't have the enforcing power through which it could punish the wrongdoer.
3. The growth of Administration of Justice- a change was about to witness where a sought of tariff schedules were fixed for different kinds of injury and offenses. And up to that time justice mold as private in nature without the compulsive force of the state.
4. The modernization- it was the developmental stage where the state geared its authority and took upon itself the responsibility of administering justice and punishing the wrongdoer using its force whenever necessary. This stage owes its origin and growth to the gradual evolution of the state and its political power. And with its transformation, private revenge and self-help got substituted by the administration of criminal and civil justice through law courts.

Concept: "Men being what they are-each keen to see his own interest and passionate to follow it-society can exist only under the shelter of the State, and the law and justice of the state is a permanent and necessary condition of peace order and civilization."(Salmond)

Driving from the words of Salmond it is clear that administration of justice means justice according to law. Physical force of the state is the sole or exclusive factor for a sound administration.

Administration of justice is the firmest pillar of government, and granting justice is said to be the ultimate end of law and the goal of society, which the judges of the courts have been pouring into law with new variants of justice in the form of contemporary values and need-based rights like freedom, liberty, dignity, equality and social justice as ordained in the constitutional document. Access to justice for the people is the foundation of the constitution.[**State of Haryana v. Darshna Devi, AIR 1979 SC 855, per Justice Krishna Iyer**]

Classification: Under the purview of administration of justice it is classified into two kinds:-

1. **Civil justice:** Blackstone called it as 'private wrong'. It has been defined as civil injuries where violation or infringement of civil or legal rights of an individual is taken into consideration. A civil case may result in an award of compensation or dismissal of the case. In jurisprudential term, the right of justice is enforced through the administration of civil justice which connotes enforcement and protection of rights as opposed to the punishment of wrongs.

The rights to be enforced under it may either be primary rights or secondary rights. Where the enforcement of **Primary rights;** is also called *specific performance* wherein the defendant is compelled to do the very act which is agreed upon to be done. For instance, payment of debt, or to perform a contract or restore land or property wrongfully taken or detained. It also connotes *remedial rights* under it, where the purpose may be either imposition of a pecuniary penalty upon the wrongdoer; or providing for pecuniary compensation to the plaintiff in respect of the damages which he has suffered from the defendant's wrongful act.

And on the other hand is the **Sanctioning rights;** where the right to receive pecuniary compensation or damages from wrongdoer may be of two kinds:- (i) restitution- here the defendant is compelled to give up or restore the pecuniary value or some benefit which he has wrongfully obtained. (ii) The penal redress, where it's not only restoration of all benefits which the wrongdoer has achieved through his wrongful acts, but also a full redress for the plaintiff loses.

Section 9 of the Civil Procedure Code, 1908 defines a civil suit. The civil courts in India have the power to try all suits of civil nature excepting those the cognizance of which is expressly or impliedly barred. These courts can grant declaratory, prohibitory and momentary reliefs.

2. **Criminal Justice:** Blackstone stated it as 'public wrong'. The main purpose of administration of criminal justice has always been to punish the offender, while in certain general exceptional cases the accused may get acquitted. The nature of the violation of public rights and duties which affects the community as a whole is called a crime and a criminal proceeding results in applying on punishment varying from sentence of death to a mere fine or binding over the lawbreaker to keep the peace or his release on probation after admonition.

Under this, the magistrate has to decide the guilt of the accused on the basis of the evidence before him.

* ADVANCEMENT OF LEARNING* CORPORATELIFE* PATRIOTISM*